

No. 93-5256-CFY
Status: GRANTED

Title: Fredel Williamson, Petitioner
v.
United States

Docketed:
July 15, 1993

Court: United States Court of Appeals for
the Eleventh Circuit

See also:
93-5738

Counsel for petitioner: Waxman, Benjamin
Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Jun 15 1993	G	Application (A92-942) to extend the time to file a petition for a writ of certiorari from June 22, 1993 to August 7, 1993, submitted to Justice Kennedy.
2	Jun 16 1993		Application (A92-942) granted by Justice Kennedy extending the time to file until July 15, 1993.
3	Jul 15 1993	D	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
6	Aug 13 1993		Order extending time to file response to petition until September 17, 1993.
7	Sep 17 1993		Brief of respondent United States in opposition filed.
8	Sep 23 1993		DISTRIBUTED. October 8, 1993
9	Oct 4 1993	X	Reply brief of petitioner filed.
10	Oct 12 1993		Record requested -- WHR.
11	Dec 7 1993		Record filed.
		*	Certified proceedings from USCA/11th Circuit and USDC/Middle District of Georgia, Macon Division (1 box) REDISTRIBUTED. January 7, 1994 (Page 21)
12	Dec 9 1993		Petition GRANTED.
14	Jan 10 1994		*****
15	Jan 21 1994		The order entered January 10, 1994, is amended to read as follows: In lieu of the first question presented by the petition for certiorari, the parties are directed to brief and argue, in addition to Questions 2 and 3, the following question: 'Whether a post-arrest confession by an accomplice implicating a defendant, offered as an admission against penal interest of an unavailable declarant under Federal Rule of Evidence 804(b)(3), bears adequate indicia of reliability to render it admissible under Rule 804(b)(3) and the Sixth Amendment Confrontation Clause?'
16	Feb 24 1994		Joint appendix filed.
17	Mar 4 1994		Brief of petitioner Fredel Williamson filed.
19	Mar 7 1994		SET FOR ARGUMENT MONDAY, APRIL 25, 1994. (2ND CASE).
18	Mar 8 1994		CIRCULATED.
20	Mar 24 1994		Brief amici curiae of California, et al. filed.
22	Mar 25 1994	X	Brief amicus curiae of Wayne County, Michigan filed.
21	Mar 28 1994	X	Brief of respondent United States filed.
23	Apr 13 1994	N	Motion of petitioner to supplement the record filed.
24	Apr 13 1994	X	Reply brief of petitioner Fredel Williamson filed.
25	Apr 18 1994		REDISTRIBUTED. April 22, 1994 (Page 16)
27	Apr 25 1994		ARGUED.

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY
AT THE TIME OF FILMING. IF AND WHEN A
BETTER COPY CAN BE OBTAINED, A NEW FICHE
WILL BE ISSUED.

No. A-942

98-5256

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

FREDEL WILLIAMSON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ORIGINAL

ON PETITION FOR WRIT OF CERTIORARI TO
THE ELEVENTH CIRCUIT COURT OF APPEAL

PETITION FOR WRIT OF CERTIORARI

BENJAMIN S. WAXMAN, ESQUIRE
Counsel of Record for Petitioner Fredel
Williamson
ROBBINS, TUNKEY, ROSS, AMSEL &
RABEN, P.A.
2250 Southwest Third Avenue
Fourth Floor
Miami, Florida 33129
Telephone: (305) 858-9550

RECEIVED
JUL 19 1993
OFFICE OF THE CLERK
SUPREME COURT, II

Supreme Court, U.S.
FILED
7-18-93
OFFICE OF THE CLERK

QUESTIONS PRESENTED

I. Whether a post-arrest confession by an accomplice implicating a defendant, offered as an admission against penal interest of an unavailable declarant under Federal Rule of Evidence 804(b)(3), bears adequate indicia of reliability to render it admissible under the sixth amendment confrontation clause?

II. Whether a post-arrest confession by an accomplice implicating a defendant, offered as an admission against penal interest of an unavailable declarant under Federal Rule of Evidence 804(b)(3), constitutes a firmly rooted hearsay exception rendering it presumptively reliable and not subject to further analysis under the sixth amendment confrontation clause?

III. Whether 804(b)(3)'s requirement that a statement must be corroborated by circumstances clearly indicating its trustworthiness, is subject to the further requirement of *Idaho v. Wright*, 497 U.S. 805 (1990), that the only circumstances that can be considered are those surrounding the making of the statement?

TABLE OF CONTENTS

PAGE(S)

QUESTIONS PRESENTED i

TABLE OF CITATIONS iv

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISION AND RULE INVOLVED 1

STATEMENT OF THE CASE 2

 A. Procedural History 2

 B. Facts 2

REASONS FOR GRANTING THE WRIT 4

 I. THE ELEVENTH CIRCUIT COURT OF APPEALS HAS IMPLICITLY DECIDED
 A FUNDAMENTAL FEDERAL QUESTION IN A WAY WHICH CONFLICTS
 WITH APPLICABLE DECISIONS OF THIS COURT AND DECISIONS OF
 OTHER FEDERAL COURTS OF APPEALS. 4

 A. THE CASE LAW OF THE ELEVENTH CIRCUIT WHICH PERMITS
 THE GOVERNMENT TO INTRODUCE AN INCULPATORY
 CONFESSION OF AN ACCOMPLICE PURSUANT TO FEDERAL RULE
 OF EVIDENCE 804(b)(3), BECAUSE IT IS A FIRMLY ROOTED
 HEARSAY EXCEPTION, CONFLICTS WITH *LEE V. ILLINOIS*, 476 U.S.
 530 (1986), AND THE OPINIONS OF OTHERS FEDERAL COURTS
 OF APPEALS 7

 B. THE CASE LAW OF THE ELEVENTH CIRCUIT, WHICH PERMITS
 THE GOVERNMENT TO INTRODUCE THE INCULPATORY
 CONFESSION OF AN ACCOMPLICE PURSUANT TO FEDERAL RULE
 OF EVIDENCE 804(b)(3) IF ITS TRUSTWORTHINESS
 DEMONSTRATED BY INDEPENDENT CORROBORATING EVIDENCE
 CONFLICTS WITH *IDAHO V. WRIGHT*, 497 U.S. 805 (1990), AND
 OPINIONS OF OTHER FEDERAL COURTS OF APPEALS 11

TABLE OF CONTENTS (Continued)

	<u>PAGE(S)</u>
II. THE ELEVENTH CIRCUIT COURT OF APPEALS HAS, BY AFFIRMING THE DISTRICT COURT'S RULING ADMITTING AN UNRELIABLE INCUPLATORY CONFESSION OF A NON-TESTIFYING ACCOMPLICE, SO FAR SANCTIONED THE LOWER COURT'S DEPARTURE FROM THE ACCEPTABLE AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER	12
CONCLUSION	15

TABLE OF CITATIONS

CASES

PAGE(S)

<i>Bruton v. United States</i> 391 U.S. 123 (1968)	7-9, 14
<i>California v. Green</i> 399 U.S. 149 (1970)	5
<i>Chambers v. Mississippi</i> 410 U.S. 284 (1973)	13
<i>Davis v. Alaska</i> 415 U.S. 308 (1974)	5
<i>Douglas v. Alabama</i> 380 U.S. 415 (1965)	7, 14
<i>Fuson v. Jago</i> 773 F.2d 55 (6th Cir. 1985)	10, 14
<i>Idaho v. Wright</i> 497 U.S. 805 (1990)	i, 6, 11, 13, 14
<i>Jennings v. Maynard</i> 946 F.2d 1502 (10th Cir. 1991)	10
<i>Kruelwitch v. United States</i> 336 U.S. 440 (1949)	13
<i>Lee v. Illinois</i> 476 U.S. 530 (1986)	5, 7-10, 12, 14
<i>Morrison v. Duckworth</i> 929 F.2d 1180 (7th Cir. 1991)	10, 14
<i>Ohio v. Roberts</i> 448 U.S. 56 (1980)	5, 6
<i>Pointer v. Texas</i> 380 U.S. 400 (1965)	5

TABLE OF CITATIONS (Continued)

<u>CASES</u>	<u>PAGE(S)</u>
<i>United States v. Boyce</i> 849 F.2d 833 (3d Cir. 1988)	14
<i>United States v. Flores</i> 985 F.2d 770 (5th Cir. 1993)	6, 10, 12, 14
<i>United States v. Gomez-Lemos</i> 939 F.2d 326 (6th Cir. 1991)	14
<i>United States v. Harrell</i> 788 F.2d 1524 (11th Cir. 1986)	13
<i>United States v. Harty</i> 930 F.2d 1257 (7th Cir. 1991)	12
<i>United States v. Johnson</i> 802 F.2d 1459 (DC Cir. 1986)	14
<i>United States v. Lilley</i> 581 F.2d 182 (8th Cir. 1978)	10
<i>United States v. Magna-Olvera</i> 917 F.2d 401 (9th Cir. 1990)	10, 14
<i>United States v. Palumbo</i> 639 F.2d 123 (3d Cir.), <i>cert.denied</i> , 454 U.S. 819 (1981)	10, 13, 14
<i>United States v. Riley</i> 657 F.2d 1377 (8th Cir. 1981), <i>cert.denied</i> , 459 U.S. 111 (1983)	10, 14
<i>United States v. Robinson</i> 635 F.2d 363 (5th Cir. unit B), <i>cert.denied</i> , 452 U.S. 961 (1981)	13
<i>United States v. Sarmiento-Perez</i> 633 F.2d 1092 (5th Cir. unit A 1981)	13, 15

TABLE OF CITATIONS (Continued)

<u>CASES</u>	<u>PAGE(S)</u>
<i>United States v. Seeley</i> 892 F.2d 1 (1st Cir. 1989)	10
<i>United States v. Taggart</i> 944 F.2d 837 (11th Cir. 1991)	9-11
<i>United States v. Vernor</i> 902 F.2d 1182 (5th Cir. 1990)	10
<i>United States v. York</i> 933 F.2d 1343 (7th Cir. 1991)	10, 12
<i>Vincent v. Parke</i> 942 F.2d 989 (6th Cir. 1991)	14

OTHER AUTHORITIES

Federal Rule of Evidence 801(d)(2)(E)	13
Federal Rule of Evidence 804(b)(3)	i, 1, 7, 9-11
United States Code 28 section 1254(1)	1
United States Constitution, Sixth Amendment	i, 1, 2, 4, 6, 12
Wigmore, <i>Evidence</i> §1395 at 123 (3d ed. 1940)	5

OPINION BELOW

The unpublished opinion of the United States Court of Appeals, Eleventh Circuit, is reproduced in the Appendix (hereinafter "A") at page 1. The rulings by the District Court which the court of appeals affirmed are reproduced at A-2-6.

JURISDICTION

The judgment to be reviewed was entered on December 23, 1992. A-1. Mr. Williamson's Suggestion of Rehearing *En Banc* was denied on March 24, 1993. A-7. By order dated June 16, 1993, this Court granted Mr. Williamson's Application for Extension of Time to File Petition for Writ of Certiorari to July 15, 1993. Jurisdiction is conferred on this Court by 28 U.S.C. section 1254(1).

CONSTITUTIONAL PROVISION AND RULE INVOLVED

Confrontation Clause of the Sixth Amendment to the United States Constitution:

In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him

Federal Rule of Evidence 804(b)(3):

Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

STATEMENT OF THE CASE

A. Procedural History

Mr. Williamson and co-defendant Reginald Harris were charged in the Middle District of Georgia with conspiring to possess with intent to distribute cocaine, possession with intent to distribute the cocaine, and interstate travel for the purpose of promoting and carrying on the unlawful activity of distributing cocaine. Prior to trial, the government moved to sever the defendants asserting that it intended to introduce post-arrest statements of Harris that would incriminate Mr. Williamson. The government conceded that the introduction of the statements would violate Mr. Williamson's sixth amendment right to confrontation. The district judge granted the motion.

At Mr. Williamson's trial, the government called Harris as a witness. Contrary to the position it took previously, after co-defendant Harris invoked his fifth amendment privilege, was granted immunity, and persisted in his refusal to testify, the government proffered Harris's post-arrest statements through a DEA agent. Mr. Williamson interposed timely hearsay and confrontation clause objections. The district judge overruled all objections and related motions for mistrial.

The jury found Mr. Williamson guilty on all three counts. The district judge adjudicated him guilty and sentenced him to 327 months imprisonment.

B. Facts

After seeing the wheels of co-defendant Harris's vehicle veer off the interstate highway, a deputy sheriff stopped him to investigate. After obtaining consent to search, the deputy discovered 19 kilograms of cocaine in two pieces of luggage in the trunk. Harris was

immediately arrested.

After being in custody for approximately one hour and being advised that any cooperation he provided would be relayed to the prosecuting attorney, Harris was interrogated telephonically by a DEA agent. The agent testified at trial that during this interrogation, Harris told him that the cocaine seized from his vehicle was acquired by Mr. Williamson, that it belonged to Mr. Williamson, and that he was supposed to deliver it in a dumpster later that night in Atlanta.

Harris was interrogated a second time by the agent, this time in person, after being in custody for approximately six and one-half hours. After Harris was again told that any cooperation he provided would be documented and relayed to the prosecutor, the agent testified at trial that Harris stated he had rented his automobile several days before and had driven it to Ft. Lauderdale, Florida, to meet Mr. Williamson. The agent testified that Harris told him he acquired the cocaine in Ft. Lauderdale from a Cuban acquaintance of Mr. Williamson who placed the cocaine in the trunk and left written instructions on how to deliver it. When Walton pressed Harris to assist with a controlled delivery, Harris stated he had lied about the delivery to the trash dumpster, the pick-up from the Cuban, and the note regarding the delivery instructions. The agent testified that Harris now stated he was delivering the cocaine to Mr. Williamson in Atlanta but that any controlled delivery would be impossible because Mr. Williamson had been travelling in front of him at the time of his arrest and would have observed the entire event.

Harris's post-arrest statement was clearly the linchpin evidence against Mr. Williamson. From the car, the government introduced a piece of luggage which bore the

initials "D.L.W." Mr. Williamson's sister's name was Deborah Lynn Williamson. An envelope addressed to Fredel Williamson was found inside the glove compartment. A United States Parcel Post receipt in the name of Mr. Williamson's girlfriend, Clara Marlow, was found in the glove compartment. Fredel Williamson was listed as an additional driver on the rental agreement signed by Harris. However, no finger prints of Mr. Williamson were found in the vehicle or upon any of its contents.

REASONS FOR GRANTING THE WRIT

- I. THE ELEVENTH CIRCUIT COURT OF APPEALS HAS IMPLICITLY DECIDED A FUNDAMENTAL FEDERAL QUESTION IN A WAY WHICH CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT AND DECISIONS OF OTHER FEDERAL COURTS OF APPEALS.

The Eleventh Circuit Court of Appeals' *per curiam* decision below, though brief in length, is fraught with error. Behind it lies Mr. Williamson's conviction which the government secured based on the post-arrest confession of a non-testifying alleged accomplice. The circumstances surrounding the making of this statement overwhelmingly confirmed its presumptive unreliability. The Eleventh Circuit's apparent analysis of this testimony, consistent with another opinion it has rendered, conflicts with the applicable decisions of this Court as well as the other courts of appeals. A careful analysis of the leading decisions in other circuits demonstrate that the federal appellate courts are hopelessly conflicted by this common but crucial issue. A unifying decision from this Court is direly needed.

The sixth amendment's confrontation clause guarantees the right of an accused in a criminal prosecution "to be confronted with the witnesses against him. The main essential purpose of confrontation is to secure for the opponent the opportunity of cross-

examination." *Davis v. Alaska*, 415 U.S. 308, 315-16 (1974)(quoting 5J. Wigmore, *Evidence* §1395 at 123 (3d ed. 1940). "There are few subjects, perhaps, upon which [the United States Supreme] Court and other courts have been more nearly unanimous than in the expression of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of a fair trial which is this country's constitutional goal." *Pointer v. Texas*, 380 U.S. 400, 405 (1965).

The right to confront and cross-exam adverse witnesses serves symbolic and functional goals. First, the confrontation clause advances the perception of fairness by "insuring that convictions will not be based on the charges of unseen and unknown - and hence unchallengeable - individuals. *Lee v. Illinois*, 476 U.S. 530, 540 (1986). It condemns the injustices wrought by the notorious Star Chamber of 17th Century England. Second, it promotes reliability in criminal trials. As this Court observed in *California v. Green*, 399 U.S. 149 (1970), confrontation

(1) insures that the witness will give his statement under oath - thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the "greatest legal engine ever invented for the discovery of truth"; [and] (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.

Id. at 158.

In *Ohio v. Roberts*, 448 U.S. 56 (1980), this Court set forth the general framework for determining when incriminating statements admissible under an exception to the hearsay rule also meet the requirements of the Confrontation Clause. As this Court restated in

Idaho v. Wright, 497 U.S. 805 (1990):

First, in conformance with the Framers' preference for face-to-face accusation, the Sixth Amendment establishes a rule of necessity. "In the usual case ..., the prosecution must either produce or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant. ..." Second, once a witness is shown to be unavailable, "his statement is admissible only if it bears adequate 'indicia of reliability.' Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness."

Id. at ____ (quoting *Ohio v. Roberts*, 448 U.S. at 65-66). With regard to this latter requirement, this Court in *Wright* clarified that in demonstrating the trustworthiness of such a hearsay statement, a court may only consider those circumstances surrounding the making of the statement and that rendered the declarant particularly worthy of belief, not the totality of circumstances that may have been proved at trial. *Id.* at ____.

According to the foregoing analysis, as the court observed in *United States v. Flores*, 985 F.2d 770 (5th Cir. 1993), there are two paradigms for analyzing the constitutionality of statements offered as hearsay exceptions. Under both, the confrontation clause requires the government to show that the declarant is unavailable and the statement bears adequate indicia of reliability. *Id.* at 775. If the hearsay falls within a firmly rooted hearsay exception, reliability may be presumed. If not, reliability must be shown from particularized guarantees of trustworthiness derived only from those circumstances surrounding the making of the statement and that render the declarant particularly worthy of belief. *Id.*

- A. THE CASE LAW OF THE ELEVENTH CIRCUIT WHICH PERMITS THE GOVERNMENT TO INTRODUCE AN INCUPLYATORY CONFESSION OF AN ACCOMPLICE PURSUANT TO FEDERAL RULE OF EVIDENCE 804(b)(3), BECAUSE IT IS A FIRMLY ROOTED HEARSAY EXCEPTION, CONFLICTS WITH *LEE V. ILLINOIS*, 476 U.S. 530 (1986), AND THE OPINIONS OF OTHERS FEDERAL COURTS OF APPEALS.

In a long line of cases, this Court has recognized that the "truth-finding function of the Confrontation Clause is uniquely threatened when an accomplice's confession is sought to be introduced against a criminal defendant without the benefit of cross-examination." *Lee*, 476 U.S. at 541. Thus, in *Douglas v. Alabama*, 380 U.S. 415 (1965), this Court reversed the defendant's conviction because a confession purportedly made by the non-testifying accomplice, which implicated the defendant, was read to the jury by the prosecutor. This Court held that the defendant's "inability to cross examine [the accomplice] as to the alleged confession plainly denied him the right of cross-examination secured by the Confrontation Clause." *Id.* at 419. The holding was premised on the understanding that when one person accuses another of a crime under circumstances in which the declarant stands to gain by inculpating another, the accusation is presumptively suspect and must be subjected to the scrutiny of cross-examination.

Likewise, in *Bruton v. United States*, 391 U.S. 123 (1968), this Court reversed the defendant's conviction based on the jury hearing the confession of his non-testifying co-defendant which implicated him. Despite a limiting instruction, this Court concluded that the introduction of the co-defendant's uncross-examined confession violated the defendant's right of confrontation. *Id.* at 135. After noting the "inevitably suspect" credibility of an

accomplice's inculpatory statements about his alleged co-conspirator, this Court declared that the unreliability of such a confession is "intolerably compounded" when the alleged accomplice "does not testify and cannot be tested by cross-examination." *Id.* at 136.

In the most recent case, this Court held in *Lee v. Illinois* that the trial judge's reliance upon the post-arrest confession of a non-testifying accomplice in sustaining the defendant's conviction was reversible error. In a murder case in which only one bullet had been fired, the accomplice fingered the defendant as the triggerman. The Court recognized that due to a co-conspirator's "strong motivation to implicate the defendant" in order "to shift or spread blame, curry favor, avenge himself, or divert attention to another," a co-conspirator's post-arrest statements about the defendant's involvement in the crime must be viewed with "special suspicion." *Id.*, 476 U.S. at 541, 545. "[O]nce partners in crime recognize that the 'jig is up,' they tend to lose any identity of interest and immediately become antagonists, rather than accomplices." *Id.* at 544-45.

Before analyzing and rejecting Illinois's contention that the circumstances surrounding the confession rebutted the presumption of unreliability, this Court summarily rejected Illinois's assertion that the statements at issue bore sufficient indicia of reliability because they fell within a firmly rooted hearsay exception: "We reject respondent's categorization of the hearsay involved in this case as a simple declaration against penal interests. That concept defines too large a class for meaningful confrontation clause analysis. We decide this case as involving a confession by an accomplice which incriminates

a criminal defendant." *Id.* at 544 n.5¹ Accord *Bruton v. United States*, 391 U.S. 123, 128 n.3 (1968). While not creating a per se rule of inadmissibility, these cases make clear that such statements rarely, if ever, qualify for admission. See Fed.R.Evid. 804(b)(3), Notes of Advisory Committee on 1972 Proposed Rules.

Although silent on its face, the Eleventh Circuit's opinion below affirming Mr. Williamson's conviction and admission of the hearsay statements against him allows for two possible explanations: either the court concluded that Harris's confession inculcating Mr. Williamson and offered as a declaration against penal interest of an unavailable declarant under Rule 804(b)(3) was a firmly rooted exception requiring no further corroboration, or that it was not a firmly rooted exception but that its presumptive unreliability had been rebutted by a showing of particularized guarantees of trustworthiness. The court's decision and analysis in *United States v. Taggart*, 944 F.2d 837 (11th Cir. 1991), indicates the court's ruling *instanter* may well have been based on an erroneous conclusion, directly contrary to *Lee*, that a confession by an accomplice which incriminates a criminal defendant is properly admissible under 804(b)(3) and passes muster under the confrontation clause because it

¹ Even the dissenting justices in *Lee* recognized this distinction:

Indeed, accomplice confessions ordinarily are untrustworthy precisely because they are *not* unambiguously adverse to the penal interests of the declarant. It is of course against one's penal interest to confess to criminal complicity, but often that interest can be advanced greatly by ascribing the bulk of the blame to one's confederates. It is in circumstances raising the latter possibility - circumstances in which the accomplice's out-of-court statements implicating the defendant may be very much in the accomplice's penal interests - that we have viewed the accomplice's statements as "inevitably suspect."

"falls within a firmly rooted hearsay exception." *Id.* at 840.

The federal circuit courts of appeals are sharply divided on the meaning of *Lee* and whether inculpatory confession's of accomplices offered as statements against penal interest fall within a firmly rooted hearsay exception. Panels of the First, Tenth and Eleventh Circuits have expressly concluded that such statements do fall within a firmly rooted hearsay exception. *United States v. Seeley*, 892 F.2d 1, 2 (1st Cir. 1989); *Jennings v. Maynard*, 946 F.2d 1502, 1505 (10th Cir. 1991); *Taggart*, 944 F.2d at 840. The Fifth Circuit has expressly held that inculpatory confessions of accomplices offered under 804(b)(3) do not fall within a firmly rooted exception. *United States v. Flores*, 985 F.2d 770, 775 (5th Cir. 1993); *United States v. Vernor*, 902 F.2d 1182, 1186-87 (5th Cir. 1990). The Seventh Circuit has held that, though Rule 804(b)(3) is generally a firmly rooted exception, *United States v. York*, 933 F.2d 1343, 1363 (7th Cir. 1991), where the statement being offered is an inculpatory confession of a non-testifying accomplice, the statement does not constitute a firmly rooted exception. *Morrison v. Duckworth*, 929 F.2d 1180, 1182 n.2 (7th Cir. 1991). The Third, Sixth, Eighth, and Ninth Circuits take the view that inculpatory confessions of non-testifying accomplices are inadmissible because they fail to even meet Rule 804(b)(3)'s requirement that the statement be against the declarant's penal interest. *United States v. Palumbo*, 639 F.2d 123, 127-28 (3d Cir.), *cert.denied*, 454 U.S. 819 (1981); *Fuson v. Jago*, 773 F.2d 55, 60-61 (6th Cir. 1985); *United States v. Riley*, 657 F.2d 1377, 1383-85 (8th Cir. 1981), *cert.denied*, 459 U.S. 111 (1983); *United States v. Lilley*, 581 F.2d 182 (8th Cir. 1978); *United States v. Magna-Olvera*, 917 F.2d 401, 407-09 (9th Cir. 1990). Guidance from this Court is needed to bring these cases into line.

- B. THE CASE LAW OF THE ELEVENTH CIRCUIT, WHICH PERMITS THE GOVERNMENT TO INTRODUCE THE INCUPLYATORY CONFESSION OF AN ACCOMPLICE PURSUANT TO FEDERAL RULE OF EVIDENCE 804(b)(3) IF ITS TRUSTWORTHINESS DEMONSTRATED BY INDEPENDENT CORROBORATING EVIDENCE CONFLICTS WITH *IDAHO V. WRIGHT*, 497 U.S. 805 (1990), AND OPINIONS OF OTHER FEDERAL COURTS OF APPEALS.

If the Eleventh Circuit in the instant case did not affirm Mr. Williamson's conviction based on an erroneous conclusion that Harris's post-arrest confession implicating Mr. Williamson was inherently reliable as a firmly rooted exception to the hearsay rule, then it must have done so based on equally erroneous reasoning, contrary to this Court's decision in *Idaho v. Wright*, that the "totality of the circumstances" established sufficient indicia of reliability. As may be apparent and will be explained in greater detail *infra*, the circumstances that surrounded the making of Harris's statement and reflected on his credibility in making the statement, only confirmed the judicial presumption of unreliability. Thus, the court could only have looked to other evidence introduced at trial to rebut the presumption of unreliability. Moreover, the Eleventh Circuit's opinion in *Taggart* demonstrates that, notwithstanding the rule of *Idaho v. Wright*, the court continues to look to the totality of the evidence introduced at trial in determining the reliability of such hearsay statements. *Taggart*, 944 F.2d at 840.

With regard to the other circuits' interpretation of *Idaho v. Wright*, some courts have superimposed the limitation on the circumstances that can be examined to determine reliability upon Rule 804(b)(3)'s requirement that a statement, to be admissible, must be supported by circumstances which "clearly indicate the trustworthiness of the statement.

E.g., *United States v. Flores*, 985 F.2d 770, 774-77 (5th Cir. 1993); *United States v. York*, 933 F.2d 1343, 1360-64 (7th Cir. 1991). Other circuits analyze the totality of the circumstances under the rule but then limit the analysis to circumstances surrounding the making of the statement to insure compliance with the sixth amendment. *E.g.*, *United States v. Harty*, 930 F.2d 1257, 1262-65 (7th Cir. 1991). Guidance from this Court is also needed to align the circuits on this important issue.

- II. THE ELEVENTH CIRCUIT COURT OF APPEALS HAS, BY AFFIRMING THE DISTRICT COURT'S RULING ADMITTING AN UNRELIABLE INCUPLYATORY CONFESSION OF A NON-TESTIFYING ACCOMPLICE, SO FAR SANCTIONED THE LOWER COURT'S DEPARTURE FROM THE ACCEPTABLE AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER.

The decision of the Eleventh Circuit Court of Appeals below, affirming the district court's ruling admitting the inculpatory confession of Mr. Williamson's non-testifying accomplice against him, was unjustified. The decision resulted in a wholesale denial of Mr. Williamson's invaluable right to confront his accusers. It contravened firm doctrine established by this Court and applied by the other federal circuit courts of appeals. It resulted in a gross miscarriage of justice.

The district court was utterly confounded by the evidentiary and constitutional issues presented by Mr. Williamson's objection to the hearsay against him. In its first "pass" at the issue, the court appeared to conclude it was trustworthy simply because he found it to have been voluntary. A-3. This Court stated in *Lee* that the voluntariness of a post-arrest confession does not even bear on its trustworthiness for confrontation clause purposes. *Id.*, 476 U.S. at 544 (1986). Second, the court relied on the totality of "corroborating

circumstances" to justify its ruling. A-3. This Court's decision in *Idaho v. Wright*, decided prior to the decision below, prohibits such a wide-ranging inquiry. Finally, the district court based its analysis on the case of *United States v. Robinson*, 635 F.2d 363 (5th Cir. unit B), *cert.denied*, 452 U.S. 961 (1981). A-2-3. This case was materially distinguishable because the declarant was not in custody at the time of his confession. The court, also, impermissibly relied upon the totality of the evidence introduced against the defendant at trial to supply the necessary corroboration for the statement. *Id.*, 635 F.2d at 364.

Upon its second pass at the issue, the district court justified introduction of Harris's uncross-examined confession under the co-conspirator exception to the hearsay rule. See Fed.R.Evid. 801(d)(2)(E). A-4-5. However, the law is clear that statements of a co-conspirator made to law enforcement following the co-conspirator's arrest are not admissible under this hearsay exception. See *Krueitich v. United States*, 336 U.S. 440, 443-45 (1949).

Upon the district court's third pass at the issue, it again relied upon a case, *United States v. Harrell*, 788 F.2d 1524 (11th Cir. 1986), A-6, that is materially distinguishable. In *Harrell*, the declarant gave the statement spontaneously to an undercover agent whom he believed was a confederate. *Id.* at 1527. Such spontaneous statements, when made to friends or confederates, are universally recognized to have special guarantees of trustworthiness. See, *Chambers v. Mississippi*, 410 U.S. 284, 300 (1973), *United States v. Palumbo*, 639 F.2d 123, 133 (3d Cir.), *cert.denied*, 454 U.S. 819 (1981); *United States v. Sarmiento-Perez*, 633 F.2d 1092 (5th Cir. unit A 1981), *cert.denied*, 459 U.S. 834 (1982). Harris's statement was made to law enforcement following his arrest. Additionally, the court in *Harrell*, as with the court in *Robinson*, relied upon other evidence introduced at trial

to corroborate the hearsay statements. *Wright* prohibits consideration of such evidence to establish trustworthiness.

The Eleventh Circuit Court of Appeal's decision below cannot be justified on any other basis. Harris's confession was made under precisely those circumstances which this Court has repeatedly held are highly suspect and render the statement presumptively unreliable. *Lee; Bruton; Douglas*. Additionally, the circumstances surrounding the statement uniformly and overwhelmingly confirmed its unreliability. The statements were made after one and six and one-half hours in custody, respectively. They were made in response to interrogation and upon Harris being advised that any cooperation would be relayed to the prosecutor. The statements Harris made were contradictory. They were consistent only inasmuch as they minimized Harris's involvement as that of a mule and Mr. Williamson's involvement as the purchaser, owner, and recipient of the cocaine. Harris refused to give a written statement and was concerned about his oral statement being tape recorded. The decisions of other circuit courts of appeal uniformly recognize that such hearsay statements are inadmissible and violative of a defendant's confrontation rights. *E.g., United States v. Flores*, 985 F.2d 770 (5th Cir. 1993); *Vincent v. Parke*, 942 F.2d 989 (6th Cir. 1991); *United States v. Gomez-Lemos*, 939 F.2d 326 (6th Cir. 1991); *Morrison v. Duckworth*, 929 F.2d 1180, 1182 n.2 (7th Cir. 1991); *United States v. Magna-Olvera*, 917 F.2d 401, 408-09 (9th Cir. 1990); *United States v. Boyce*, 849 F.2d 833 (3d Cir. 1988); *United States v. Johnson*, 802 F.2d 1459, 1464-65 (DC Cir. 1986); *Fuson v. Jago*, 773 F.2d 55, 60 (6th Cir. 1985), *cert.denied*, 478 U.S. 1020 (1986); *United States v. Riley*, 657 F.2d 1377, 1383-85 (8th Cir. 1981), *cert.denied*, 459 U.S. 111 (1983); *United States v. Palumbo*, 639 F.2d 123, 127-28 (3d Cir.), *cert.denied*, 454

U.S. 819 (1981); *United States v. Sarmiento-Perez*, 633 F.2d 1092, 1101-02 (5th Cir. unit A 1981), *cert.denied*, 459 U.S. 834 (1982).

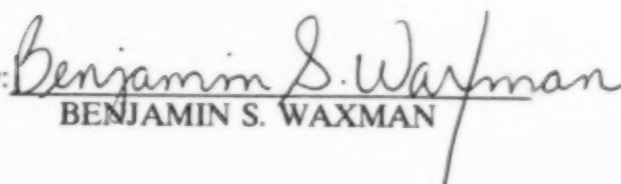
Mr. Williamson's conviction rests upon the hearsay statements of an uncross-examined co-defendant who implicated Mr. Williamson following his arrest under circumstances providing him every possible incentive to blame Mr. Williamson. Admitting these statements into evidence violated Mr. Williamson's confrontation rights and compromised the trial's truth-seeking function. The decision of the court below, summarily affirming the trial court's admission of these inherently unreliable statements, conflicts with decisions of this Court and those of the other federal circuit courts of appeals. Thus, the decision of the court below has so far departed from the acceptable and usual course of judicial proceedings and requires the exercise of this Court's supervisory power.

CONCLUSION

For these reasons, the Petitioner respectfully prays that this Court grant its Writ of Certiorari.

Respectfully submitted,

ROBBINS, TUNKEY, ROSS, AMSEL &
RABEN, P.A.
2250 Southwest Third Avenue
Fourth Floor
Miami, Florida 33129
Telephone: (305) 858-9550

By: 
BENJAMIN S. WAXMAN

No. A-942

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

FREDEL WILLIAMSON,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE ELEVENTH CIRCUIT COURT OF APPEAL

APPENDIX

BENJAMIN S. WAXMAN, ESQUIRE
Counsel of Record for Petitioner Fredel
Williamson
ROBBINS, TUNKEY, ROSS, AMSEL &
RABEN, P.A.
2250 Southwest Third Avenue
Miami, Florida 33129
Telephone: (305) 858-9550

TABLE OF CONTENTS

	<u>PAGE(S)</u>
Eleventh Circuit Court of Appeal Opinion	1
District Court Ruling Admitting Post Arrest Custodial Statements of unavailable declarant that inculpated Mr. Williamson	2-3
District Court Ruling Confirming Admission of Post-Arrest Custodial Statements of unavailable declarant	4-5
District Court Ruling Reaffirming Admission of Post-Arrest Custodial Statements of unavailable declarant	6
Order Denying Petition for Rehearing and Suggestion of Rehearing <i>En Banc</i>	7

DO NOT PUBLISH

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 89-8938
Non-Argument Calendar

D. C. Docket No. CR-89-37

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT

DEC 23 1992

MIGUEL J. CORTEZ
CLERK

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FREDEL WILLIAMSON, a/k/a
"FRED",

Defendant-Appellant.

Appeal from the United States District Court
For the Middle District of Georgia

(December 23, 1992)

Before TJOFLAT, Chief Judge, HATCHETT and ANDERSON, Circuit Judges.

PER CURIAM:

Affirmed. See Circuit Rule 36-1.

Judgment Entered: December 23, 1992
For the Court: Miguel J. Cortez, Clerk

By: Karlene McNabb
Deputy Clerk

ISSUED AS MANDATE: APR 07 1993

wouldn't sign any documents, any forms.

Q Did you quit questioning him at that point?

A Abruptly. It stopped and it was over.

Q Now, while he was talking to you, did he tell you he was scared of Fredel Williamson and other people involved in this?

A He stated he was scared not only for himself but for his mother, frightened that they would be, either he or his mother would be killed, that Williamson knew where both he and his mother resided, they lived together.

Q He lived with his mother?

A According to Mr. Harris, yes, ma'am.

Q And did he complain to you about any, any agent having threatened him or any deputy having harmed him in any manner?

A No, ma'am.

Q His only fear was to Fredel Williamson and the other people related to the drug conspiracy, is that correct?

A The only fears he expressed to me, yes, ma'am.

MS. FOWLER: One moment, Your Honor. Nothing further, Your Honor.

THE COURT: Anything further, Mr. Silver?

MR. SILVER: Nothing further, Judge, thank you.

THE COURT: All right. It is the ruling of the Court that the necessary corroborating circumstances as spelled out in the case of United States versus Robinson, 635

F 2nd 363 have been met by the Government. It is clear to me that Agent Walton read him his Miranda rights. He was in custody. However, it does not appear that there was any coercion. The fact he had been in custody for six or seven hours does not give this Court any concern. The Court notes that he was in custody here in the federal courthouse in Macon, and this Court knows that the facilities here and the way prisoners are treated in this courthouse generally comply with all aspects of requirements of the various Supreme Court decisions, and so the presumption is that he was not under any, as far as I'm concerned, as far this Court is concerned, under any coercion or under such circumstances that he would not give a voluntary statement.

For that, and just based on the testimony of the agent in total, and there is a record here of it in case any appellate court ever needs to look at it, this Court finds that the corroborating circumstances clearly indicate the trustworthiness of the statement. So, when we begin in the mornings, I will, we will begin, I assume, with this agent's testimony.

Anything further before we adjourn for the day?

MS. FOWLER: Not for the Government.

MR. SILVER: Judge, on behalf of the Defendant Williamson, in reviewing that information which we have obtained from the Government by way of discovery, we are

conspiracy had ended when one of them is arrested, as to the one arrested. It doesn't necessarily end as to the others. It is offered under the unavailable exception, and the Court has gone through all the predicates of reliability and the Court has ruled that it is coming in under that unavailable exception to the hearsay requirement, and the cases --

THE COURT: I know, but that is not the question that I have already ruled on. I want to know, does it make any difference that he, that the testimony that is offered was made, the conversation was had after the conspiracy had terminated? Does that make any difference?

MS. FOWLER: No, sir.

THE COURT: Why?

MS. FOWLER: Because it is in under a different rule. We are not offering it during the pendency of the conspiracy. We are offering it under the unavailable.

THE COURT: Well, I don't think you understand what I'm saying.

MS. FOWLER: The Court --

THE COURT: My feeling is this, is that it is, although the conversation, the interview was, with Agent Walton and Mr. Harris, was made after the conspiracy terminated, that it involved the gist of the conversation, it involved -- the gist of the conversation dealt with things that happened during the pendency of the conspiracy.

Therefore, he can recount what Williamson may have done or the two of them may have done together or planned together or did together at a time before the arrest. Anything he says about Williamson, that happened after the termination of the conspiracy, if there is any such thing, and as I recall what the agent said, it all dealt with that part that, that whatever they did in planning and so forth. That is what, I think Mr. Silver's motion was that the mere fact that a conspiracy had terminated, means that anything he says after the termination of the conspiracy is inadmissible. That is your point, isn't it, Mr. Silver?

MR. SILVER: Yes, Judge. It is admissible as to Mr. Harris.

THE COURT: But not against any other?

MR. SILVER: Yes, sir.

THE COURT: I don't agree with you. I think it is admissible against Harris and Williamson, so long as Harris is testifying as to what involvement Williamson had during the pendency of the conspiracy. So, I'm going to let it go. I overrule the objection.

MR. SILVER: Thank you, Judge.

THE COURT: Your exception is preserved.

(Chambers Conference Concluded).

THE COURT: You may proceed.

BY MS. FOWLER:

(Jury excused from the courtroom).

(Brief recess).

THE COURT: All right, I have this written down, because I want to be sure I say the right words. The ruling of the Court is that the statements made by defendant Harris to Agent Walton are admissible under 804 B(3), which deals with statements against interest.

First, defendant Harris' statements clearly implicated himself, and therefore, are against his penal interest.

Second, defendant Harris, the declarant, is unavailable.

And third, as I found yesterday, there are sufficient corroborating circumstances in this case to ensure the trustworthiness of his testimony. Therefore, under United States versus Harrell, these statements by defendant Harris implicating defendant Williamson are admissible.

I do not totally understand the logic of the 11th Circuit. However, that is their logic and I am bound by it and I will follow it. That's the ruling of the Court. Bring the jury in.

(The Jury Returned to the Courtroom).

THE COURT: You may proceed.

CROSS EXAMINATION

BY MR. SILVER:

18

IN THE UNITED STATES COURT OF APPEALS FILED
U.S. COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
No. 89-8938
MAR 24 1993
MIGUEL J. CORTEZ
CLERK

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FREDEL WILLIAMSON,
a/k/a "FRED",

Defendant-Appellant.

On Appeal from the United States District Court for the
Middle District of Georgia

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

Before: TJOFLAT, Chief Judge, HATCHETT and ANDERSON, Circuit
Judges.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

() The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

() A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT

UNITED STATES CIRCUIT JUDGE

No. A-942

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

FREDEL WILLIAMSON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE ELEVENTH CIRCUIT COURT OF APPEAL

ENTRY OF APPEARANCE

THE CLERK will please enter my appearance as Counsel of Record for FREDEL
WILLIAMSON, who is the Petitioner in this Court.

I CERTIFY that I am a member of the Bar of the Supreme Court of the United
States.

Respectfully submitted,

ROBBINS, TUNKEY, ROSS, AMSEL &
RABEN, P.A.
2250 Southwest Third Avenue
Miami, Florida 33129
Telephone: (305) 858-9550

By: Benjamin S. Waxman
BENJAMIN S. WAXMAN
Counsel of Record for Petitioner
FREDEL WILLIAMSON

No. A-942

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

FREDEL WILLIAMSON,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE ELEVENTH CIRCUIT COURT OF APPEAL

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the PETITION FOR WRIT OF CERTIORARI, APPENDIX and ENTRY OF APPEARANCE were sent by United States mail, first-class postage prepaid, pursuant to S.Ct.R. 29.3, this 15th day of July, 1993, to: Charles E. Cox, Jr., Esquire, Assistant United States Attorney, Post Office Box U, Macon, Georgia 31202, Telephone: (912) 752-3511; and, the Solicitor General, Department

of Justice, Washington, D.C. 20530, Telephone: (202) 514-2000.

Respectfully submitted,

ROBBINS, TUNKEY, ROSS, AMSEL &
RABEN, P.A.
2250 Southwest Third Avenue
Miami, Florida 33129
Telephone: (305) 858-9550

By: Benjamin S. Waxman
BENJAMIN S. WAXMAN
Counsel of Record for Petitioner
FREDEL WILLIAMSON

RV LB
w
ORIGINAL

No. 93-5256 (3)

Supreme Court, U.S.

FILED

SEP 17 1993

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

FREDEL WILLIAMSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

(9)
BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

LOUIS M. FISCHER
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

15 pp

QUESTION PRESENTED

Whether the admission of an out-of-court statement by petitioner's accomplice violated the Confrontation Clause of the Sixth Amendment.

(I)

I

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

No. 93-5256

FREDEL WILLIAMSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The judgment order of the court of appeals affirming petitioner's conviction (Pet. App. 1) is unpublished, but the judgment is noted at 981 F.2d 1262 (Table).

JURISDICTION

The judgment of the court of appeals was entered on December 23, 1992, and a petition for rehearing was denied on March 24, 1993. Pet. App. 7. On June 16, 1993, Justice Kennedy granted an extension of time to file the petition until July 15, 1993, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Middle District of Georgia, petitioner was convicted of conspiring to possess, and of possessing, cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and 846, and of engaging in interstate travel to promote the distribution of cocaine, in violation of 18 U.S.C. 1952. The district court sentenced petitioner to 327 months' imprisonment. The court of appeals affirmed. Pet. App. 1.

1. On March 26, 1989, a deputy sheriff stopped a rental car driven by Reginald Harris. Harris consented to a search of the car, which revealed 19 kilograms of cocaine in luggage in the trunk. Pet. 2. The luggage bore the initials of petitioner's sister, and an envelope addressed to petitioner was in the glove compartment. Id. at 3-4. Petitioner was listed as an additional driver on the car rental agreement, and a parcel post receipt in petitioner's girlfriend's name was also in the glove compartment. Id. at 4.

Harris was arrested, and DEA Agent Donald Walton interviewed Harris twice thereafter. In the first interview -- over the telephone shortly after the arrest -- Harris said that the cocaine belonged to petitioner, and that Harris was to deliver it to a dumpster in Atlanta later that night. Several hours later, Agent Walton spoke to Harris in person. This time Harris related that he had rented the car and had driven it to Fort Lauderdale to meet petitioner. Harris said he obtained the cocaine from a Cuban

acquaintance of petitioner, who had left a note with instructions on how to deliver the cocaine. Pet. 3.

When Agent Walton proposed making a controlled delivery, Harris said he had lied about the Cuban, the note, and the delivery to the dumpster. He said that he had been transporting the cocaine to Atlanta for petitioner, that petitioner had been in another car in front of Harris and had observed the stop of Harris's car and his arrest, and that any controlled delivery would therefore be impossible. Pet. 3.

When he was called to testify at petitioner's trial, Harris invoked his Fifth Amendment privilege against compelled self-incrimination. Although he was given use immunity and ordered to testify, Harris refused to do so. Pet. 2; Gov't C.A. Br. 2, 12. Agent Walton was then permitted to relate the statements Harris had made to him. Walton explained that at the time Harris made his statements, Walton had promised only to report Harris's cooperation to the U.S. Attorney; Walton said that he did not promise that Harris would receive any reward or other benefit for cooperating. Gov't C.A. Br. 16.

Tirso Dominguez, an admitted cocaine dealer, testified that he sold petitioner cocaine in 10 to 20 kilogram quantities on five to 10 occasions in late 1987. Dominguez said that on each occasion petitioner had someone transport the cocaine from Miami by car while petitioner traveled in a separate car. Gov't C.A. Br. 6-7.

2. The district court admitted Harris's statements under Federal Rule of Evidence 804(b)(3), as declarations against penal

interest. Pet. App. 6. On appeal, petitioner argued, inter alia that those statements were not admissible under Fed. R. Evid. 804(b)(3) or the Confrontation Clause of the Sixth Amendment. The court of appeals affirmed the conviction without an opinion. Pet. App. 1.

ARGUMENT

Petitioner contends (Pet. 4-15) that the admission by the courts below of Harris's out-of-court statements violated his rights under the Confrontation Clause.

1. Federal Rule of Evidence 804(b)(3) authorizes the admission of a statement by an unavailable declarant if the statement "so far tended to subject the declarant to civil or criminal liability * * * that a reasonable person in the declarant's position would not have made the statement unless believing it to be true."^{1/} The district court admitted Harris's statements under that Rule and thus implicitly found that the statements were made under circumstances that made it unlikely that Harris would lie.

In this Court, petitioner has raised only a Confrontation Clause challenge to the admission of Harris's statements. He has

^{1/} The Rule contains a special provision applicable to statements against penal interest that are offered "to exculpate the accused." Those statements are admissible only if, in addition to satisfying the other requirements of the Rule, the proponent satisfies the court that "corroborating circumstances clearly indicate the trustworthiness of the statement." That proviso does not apply here, because Harris's statements were introduced to inculcate, not exculpate the defendant. The Fifth Circuit has misread the Rule to require a clear showing of trustworthiness in all cases in which a statement against penal interest is offered in a criminal case. United States v. Flores, 985 F.2d 770, 774 n.10 (5th Cir. 1993); United States v. Sarmiento-Perez, 633 F.2d 1092, 1101 (5th Cir. 1981).

not challenged the admissibility of those statements under Rule 804(b)(3). Because petitioner has not argued in this Court that the statements made to Agent Walton failed to satisfy the requirements of Rule 804(b)(3), the only question presented for review is whether statements that are found to satisfy the reliability test of that Rule are subject to a second screening under the Confrontation Clause and may be excluded for noncompliance with a separate reliability test derived from Confrontation Clause policies.

In our view, once a statement is found to be admissible under Rule 804(b)(3), its reliability is sufficiently established for Confrontation Clause purposes, and it should not be subject to further screening for compliance with the general policies underlying the Confrontation Clause. This position is simply a specific application of the general principle that, except for the "catch-all" hearsay exceptions, Fed. R. Evid. 803(24) and 804(b)(5), compliance with the established hearsay exceptions in the Federal Rules of Evidence is sufficient to satisfy the Confrontation Clause, and in such cases no additional Confrontation Clause inquiry is required.

1. In Ohio v. Roberts, 448 U.S. 56 (1980), this Court divided hearsay statements into two categories for purpose of Confrontation Clause analysis: those falling within a "firmly rooted" hearsay exception and those not falling within such an exception. As to statements falling into the former category, the Court held that reliability was presumed and that no further Confrontation Clause analysis was required. As to statements falling into the latter

category, the Court held that those statements could still be admitted if their reliability could be demonstrated in particular cases by "particularized guarantees of trustworthiness." *Id.* at 65-66; see also *White v. Illinois*, 112 S. Ct. 736, 743 (1992); *Idaho v. Wright*, 497 U.S. 805, 814-815 (1990).

Petitioner errs in contending that the decision below conflicts with *Idaho v. Wright*, *supra*. That decision simply established the appropriate scope of inquiry for determining whether a hearsay statement that fell into the second category defined in *Ohio v. Roberts*, *supra*, bore adequate indicia of reliability. This Court required that the reliability of such a statement be demonstrated from the circumstances surrounding the giving of the statement, not from corroborating evidence introduced at trial. *Id.* at 819. The Eleventh Circuit, however, has declared that statements admissible under Rule 804(b)(3) fall within the first category defined in *Ohio v. Roberts*; they are admissible under a firmly rooted exception to the hearsay rule. The principles of *Idaho v. Wright* are therefore not applicable here.

Nor does this case contravene *Lee v. Illinois*, 476 U.S. 530 (1986). The Court in *Lee* noted, in effect, that confessions and associated statements inculcating others could not all be rendered admissible simply by characterizing them as "declarations against penal interest." 476 U.S. at 544 n.5. The Court then looked to the circumstances of the statement at issue in that case to determine its reliability. The Court rejected the State's argument that the statement was reliable because the declarant originally

refused to speak to the police, and did so only after being told his accomplice had already implicated him and after she implored him to "share 'the rap.'" 476 U.S. at 544. The declarant had considered testifying against his accomplice, and he had powerful inducements to maximize her criminal responsibility and minimize his own. *Id.* at 544-545. Moreover, the two accomplices gave conflicting stories of the crime, and the discrepancies went to critical issues in the case, including the division of responsibility for the crime between the two accomplices. *Id.* at 546.

In this case, unlike in *Lee*, the district court found that Harris's statements satisfied the requirements of Fed. R. Evid. 804(b)(3) and thus found that the statements were truly against Harris's penal interest and were made under circumstances providing significant guarantees of reliability. Because the district court determined that Harris's statements fell within that rule, the concerns of the Court in *Lee* not to permit all custodial confessions to be admitted under the broad rubric of "declarations against penal interest" are not implicated here.

3. The courts of appeals generally have held that the hearsay exception for statements against penal interest is a firmly rooted hearsay exception, and that statements found to be admissible under Fed. R. Evid. 804(b)(3) may be admitted without further analysis for trustworthiness. See *United States v. Taggart*, 944 F.2d 837, 840 (11th Cir. 1991); *United States v. York*, 933 F.2d 1343, 1363 (7th Cir.), cert. denied, 112 S. Ct. 321 (1991); *United States v.*

Seeley, 892 F.2d 1, 2 (1st Cir. 1989); United States v. Katsougrakis, 715 F.2d 769, 775-776 (2d Cir. 1983), cert. denied, 464 U.S. 1040 (1984); see also United States v. Curry, 977 F.2d 1042, 1055-1056 (7th Cir. 1992) (reaffirming validity of York).

Petitioner argues that these cases conflict with decisions of other courts of appeals. The cases he cites as conflicting, however, do not stand for the proposition that statements satisfying the reliability requirement of Rule 804(b)(3) can nonetheless be excluded under the Confrontation Clause. Most of the cases petitioner cites have simply found, in the particular circumstances involved, that a declarant's statement was not admissible under Rule 804(b)(3), either because it was not sufficiently against his penal interest, or because it did not satisfy the express reliability requirement of the Rule. See, e.g., United States v. Magana-Olvera, 917 F.2d 401, 406-409 (9th Cir. 1990); United States v. Boyce, 849 F.2d 833, 836-837 (3d Cir. 1988); United States v. Johnson, 802 F.2d 1459, 1464-1465 (D.C. Cir. 1986); United States v. Riley, 657 F.2d 1377, 1384-1385 (8th Cir. 1981), cert. denied, 459 U.S. 1111 (1983); United States v. Palumbo, 639 F.2d 123, 127-128 (3d Cir.), cert. denied, 454 U.S. 819 (1981); United States v. Lilley, 581 F.2d 182, 187-188 (8th Cir. 1978).^{2/}

^{2/} Other cases on which petitioner relies do not establish a circuit conflict on this issue, for different reasons. Fuson v. Jago, 773 F.2d 55 (6th Cir. 1985), involved an Ohio rule of evidence; the court of appeals simply followed Ohio law in concluding that the statement in question was not against the declarant's penal interest. See 773 F.2d at 60-61. In Morrison v. Duckworth, 929 F.2d 1180 (7th Cir. 1991), although the Seventh Circuit stated that the co-defendant's confession was not against his penal interest (continued...)

In United States v. Flores, 985 F.2d 770, 775 (5th Cir. 1993), the court of appeals held that "a confession by an accomplice inculcating a defendant that is being offered as a declaration against penal interest is not a firmly rooted exception [to the hearsay rule]." That court, however, failed to distinguish clearly between the Rule 804(b)(3) analysis and the Confrontation Clause analysis. Rather than first determining whether an accomplice's confession satisfied the reliability requirement of the Rule -- that the statement was one that a reasonable person would not have made unless he believed it to be true -- the court simply lumped all custodial confessions together and held in effect that a rule admitting all such confessions would not be a "firmly rooted exception" to the hearsay rule. But of course Rule 804(b)(3) is not such a rule: it authorizes the admission of statements against penal interest only if those statements are made under circumstances providing significant guarantees of reliability.

Because the Fifth Circuit in Flores did not distinguish between the reliability requirement of Rule 804(b)(3) and the reliability inquiry dictated by the Confrontation Clause, we think its analysis was flawed. Moreover, the difference in approach between the Fifth Circuit in Flores and other courts in which compliance

^{2/} (...continued)
est to the extent that it cast blame on the defendant, see 929 F.2d at 1182 n.2, the court of appeals subsequently made clear in United States v. York, 933 F.2d at 1363, that statements inculcating an accomplice may fall within Rule 804(b)(3), and that Rule 804(b)(3) is a firmly rooted hearsay exception. Neither Vincent v. Parke, 942 F.2d 989 (6th Cir. 1991), nor United States v. Gomez-Lemos, 939 F.2d 326 (6th Cir. 1991), involved statements admitted under Rule 804(b)(3).

with Rule 804(b)(3) is deemed sufficient to satisfy the Confrontation Clause is an important issue that may well require this Court's review in an appropriate case. This is not a suitable vehicle for addressing that issue, however, for two related reasons.

First, because the issue of the admissibility of statements such as those at issue in this case is generally viewed as implicating the construction and application of Rule 804(b)(3), the issue should be addressed in a case that raises a question as to the admissibility of the evidence under the Rule as well as the Constitution. Because petitioner raises only the Confrontation Clause issue, it must be taken as a given that Harris's statements were properly admitted under Rule 804(b)(3) and therefore satisfied the reliability inquiry under that Rule. Because the reliability of the statements within the meaning of the Rule is not subject to challenge here, this case presents only an abstract question whether statements that are found reliable to the extent required by the Rule may be found unreliable under the Confrontation Clause. In order for the Court to explore the relationship between Rule 804(b)(3) and the Confrontation Clause, it would be preferable to wait for a case in which the admission of the evidence is challenged under both the Rule and the Constitution.

Second, even though it is reasonable to conclude that the Eleventh Circuit would disagree with the analysis of the Fifth Circuit in Flores, the points of disagreement are difficult to ascertain, because the Eleventh Circuit wrote no opinion in this

case. The absence of any written exposition of the Eleventh Circuit's reasoning makes it difficult to determine just what theory the Eleventh Circuit was applying in concluding that the district court did not commit reversible error in admitting Harris's out-of-court statements. While the absence of an opinion does not always counsel against this Court's exercise of its discretionary review power, we believe that on this difficult evidentiary issue, it would be preferable for the Court to have before it a clear articulation of the lower court's reasoning, both to determine the precise nature of the conflict in approach among the circuits and to aid this Court in its analysis of the evidentiary and constitutional questions involved in the particular case under review.^{3/}

^{3/} In the absence of an opinion, it is impossible to know, for example, if the Eleventh Circuit attached significance to the fact that the government attempted to obtain Harris's testimony by immunizing him, but was unable to obtain his testimony because he continued to refuse to testify even under a grant of immunity. The Fifth Circuit in Flores appeared to attach weight to the fact that the government had it within its power to obtain the declarant's testimony by immunizing him. See 985 F.2d at 783 & n.27.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

LOUIS M. FISCHER
Attorney

SEPTEMBER 1993

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

NO. 93-5256

FREDEL WILLIAMSON, PETITIONER

v.

UNITED STATES OF AMERICA

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of the **BRIEF FOR THE UNITED STATES IN OPPOSITION** by first-class mail, postage prepaid, this 17th day of SEPTEMBER 1993.

BENJAMIN WAXMAN
2250 SOUTHWEST THIRD AVENUE
FOURTH FLOOR
MIAMI, FL 33129

Drew S. Days, III
DREW S. DAYS, III
Solicitor General

September 17, 1993

RECEIVED
SUPREME COURT, U.S.
POLICE DEPARTMENT

SEP 17 1993

AM 10:11:12:13:14:15:16:17:18:19:20:21:22:23:24:25:26:27:28:29:30:31:32:33:34:35:36:37:38:39:40:41:42:43:44:45:46:47:48:49:50:51:52:53:54:55:56:57:58:59:60:61:62:63:64:65:66:67:68:69:70:71:72:73:74:75:76:77:78:79:80:81:82:83:84:85:86:87:88:89:90:91:92:93:94:95:96:97:98:99:100:101:102:103:104:105:106:107:108:109:110:111:112:113:114:115:116:117:118:119:120:121:122:123:124:125:126:127:128:129:130:131:132:133:134:135:136:137:138:139:140:141:142:143:144:145:146:147:148:149:150:151:152:153:154:155:156:157:158:159:160:161:162:163:164:165:166:167:168:169:170:171:172:173:174:175:176:177:178:179:180:181:182:183:184:185:186:187:188:189:190:191:192:193:194:195:196:197:198:199:200:201:202:203:204:205:206:207:208:209:210:211:212:213:214:215:216:217:218:219:220:221:222:223:224:225:226:227:228:229:230:231:232:233:234:235:236:237:238:239:240:241:242:243:244:245:246:247:248:249:250:251:252:253:254:255:256:257:258:259:260:261:262:263:264:265:266:267:268:269:270:271:272:273:274:275:276:277:278:279:280:281:282:283:284:285:286:287:288:289:290:291:292:293:294:295:296:297:298:299:300:301:302:303:304:305:306:307:308:309:310:311:312:313:314:315:316:317:318:319:320:321:322:323:324:325:326:327:328:329:330:331:332:333:334:335:336:337:338:339:340:341:342:343:344:345:346:347:348:349:350:351:352:353:354:355:356:357:358:359:360:361:362:363:364:365:366:367:368:369:370:371:372:373:374:375:376:377:378:379:380:381:382:383:384:385:386:387:388:389:390:391:392:393:394:395:396:397:398:399:400:401:402:403:404:405:406:407:408:409:410:411:412:413:414:415:416:417:418:419:420:421:422:423:424:425:426:427:428:429:430:431:432:433:434:435:436:437:438:439:440:441:442:443:444:445:446:447:448:449:450:451:452:453:454:455:456:457:458:459:460:461:462:463:464:465:466:467:468:469:470:471:472:473:474:475:476:477:478:479:480:481:482:483:484:485:486:487:488:489:490:491:492:493:494:495:496:497:498:499:500:501:502:503:504:505:506:507:508:509:510:511:512:513:514:515:516:517:518:519:520:521:522:523:524:525:526:527:528:529:530:531:532:533:534:535:536:537:538:539:540:541:542:543:544:545:546:547:548:549:550:551:552:553:554:555:556:557:558:559:560:561:562:563:564:565:566:567:568:569:570:571:572:573:574:575:576:577:578:579:580:581:582:583:584:585:586:587:588:589:590:591:592:593:594:595:596:597:598:599:600:601:602:603:604:605:606:607:608:609:610:611:612:613:614:615:616:617:618:619:620:621:622:623:624:625:626:627:628:629:630:631:632:633:634:635:636:637:638:639:640:641:642:643:644:645:646:647:648:649:650:651:652:653:654:655:656:657:658:659:660:661:662:663:664:665:666:667:668:669:670:671:672:673:674:675:676:677:678:679:680:681:682:683:684:685:686:687:688:689:690:691:692:693:694:695:696:697:698:699:700:701:702:703:704:705:706:707:708:709:710:711:712:713:714:715:716:717:718:719:720:721:722:723:724:725:726:727:728:729:730:731:732:733:734:735:736:737:738:739:740:741:742:743:744:745:746:747:748:749:750:751:752:753:754:755:756:757:758:759:760:761:762:763:764:765:766:767:768:769:770:771:772:773:774:775:776:777:778:779:780:781:782:783:784:785:786:787:788:789:790:791:792:793:794:795:796:797:798:799:800:801:802:803:804:805:806:807:808:809:810:811:812:813:814:815:816:817:818:819:820:821:822:823:824:825:826:827:828:829:830:831:832:833:834:835:836:837:838:839:840:841:842:843:844:845:846:847:848:849:850:851:852:853:854:855:856:857:858:859:860:861:862:863:864:865:866:867:868:869:870:871:872:873:874:875:876:877:878:879:880:881:882:883:884:885:886:887:888:889:890:891:892:893:894:895:896:897:898:899:900:901:902:903:904:905:906:907:908:909:910:911:912:913:914:915:916:917:918:919:920:921:922:923:924:925:926:927:928:929:930:931:932:933:934:935:936:937:938:939:940:941:942:943:944:945:946:947:948:949:950:951:952:953:954:955:956:957:958:959:960:961:962:963:964:965:966:967:968:969:970:971:972:973:974:975:976:977:978:979:980:981:982:983:984:985:986:987:988:989:990:991:992:993:994:995:996:997:998:999:1000:1001:1002:1003:1004:1005:1006:1007:1008:1009:1010:1011:1012:1013:1014:1015:1016:1017:1018:1019:1020:1021:1022:1023:1024:1025:1026:1027:1028:1029:1030:1031:1032:1033:1034:1035:1036:1037:1038:1039:1040:1041:1042:1043:1044:1045:1046:1047:1048:1049:1050:1051:1052:1053:1054:1055:1056:1057:1058:1059:1060:1061:1062:1063:1064:1065:1066:1067:1068:1069:1070:1071:1072:1073:1074:1075:1076:1077:1078:1079:1080:1081:1082:1083:1084:1085:1086:1087:1088:1089:1090:1091:1092:1093:1094:1095:1096:1097:1098:1099:1100:1101:1102:1103:1104:1105:1106:1107:1108:1109:1110:1111:1112:1113:1114:1115:1116:1117:1118:1119:1120:1121:1122:1123:1124:1125:1126:1127:1128:1129:1130:1131:1132:1133:1134:1135:1136:1137:1138:1139:1140:1141:1142:1143:1144:1145:1146:1147:1148:1149:1150:1151:1152:1153:1154:1155:1156:1157:1158:1159:1160:1161:1162:1163:1164:1165:1166:1167:1168:1169:1170:1171:1172:1173:1174:1175:1176:1177:1178:1179:1180:1181:1182:1183:1184:1185:1186:1187:1188:1189:1190:1191:1192:1193:1194:1195:1196:1197:1198:1199:1200:1201:1202:1203:1204:1205:1206:1207:1208:1209:1210:1211:1212:1213:1214:1215:1216:1217:1218:1219:1220:1221:1222:1223:1224:1225:1226:1227:1228:1229:1230:1231:1232:1233:1234:1235:1236:1237:1238:1239:1240:1241:1242:1243:1244:1245:1246:1247:1248:1249:1250:1251:1252:1253:1254:1255:1256:1257:1258:1259:1260:1261:1262:1263:1264:1265:1266:1267:1268:1269:1270:1271:1272:1273:1274:1275:1276:1277:1278:1279:1280:1281:1282:1283:1284:1285:1286:1287:1288:1289:1290:1291:1292:1293:1294:1295:1296:1297:1298:1299:1300:1301:1302:1303:1304:1305:1306:1307:1308:1309:1310:1311:1312:1313:1314:1315:1316:1317:1318:1319:1320:1321:1322:1323:1324:1325:1326:1327:1328:1329:1330:1331:1332:1333:1334:1335:1336:1337:1338:1339:1340:1341:1342:1343:1344:1345:1346:1347:1348:1349:1350:1351:1352:1353:1354:1355:1356:1357:1358:1359:1360:1361:1362:1363:1364:1365:1366:1367:1368:1369:1370:1371:1372:1373:1374:1375:1376:1377:1378:1379:1380:1381:1382:1383:1384:1385:1386:1387:1388:1389:1390:1391:1392:1393:1394:1395:1396:1397:1398:1399:1400:1401:1402:1403:1404:1405:1406:1407:1408:1409:1410:1411:1412:1413:1414:1415:1416:1417:1418:1419:1420:1421:1422:1423:1424:1425:1426:1427:1428:1429:1430:1431:1432:1433:1434:1435:1436:1437:1438:1439:1440:1441:1442:1443:1444:1445:1446:1447:1448:1449:1450:1451:1452:1453:1454:1455:1456:1457:1458:1459:1460:1461:1462:1463:1464:1465:1466:1467:1468:1469:1470:1471:1472:1473:1474:1475:1476:1477:1478:1479:1480:1481:1482:1483:1484:1485:1486:1487:1488:1489:1490:1491:1492:1493:1494:1495:1496:1497:1498:1499:1500:1501:1502:1503:1504:1505:1506:1507:1508:1509:1510:1511:1512:1513:1514:1515:1516:1517:1518:1519:1520:1521:1522:1523:1524:1525:1526:1527:1528:1529:1530:1531:1532:1533:1534:1535:1536:1537:1538:1539:1540:1541:1542:1543:1544:1545:1546:1547:1548:1549:1550:1551:1552:1553:1554:1555:1556:1557:1558:1559:1560:1561:1562:1563:1564:1565:1566:1567:1568:1569:1570:1571:1572:1573:1574:1575:1576:1577:1578:1579:1580:1581:1582:1583:1584:1585:1586:1587:1588:1589:1590:1591:1592:1593:1594:1595:1596:1597:1598:1599:1600:1601:1602:1603:1604:1605:1606:1607:1608:1609:1610:1611:1612:1613:1614:1615:1616:1617:1618:1619:1620:1621:1622:1623:1624:1625:1626:1627:1628:1629:1630:1631:1632:1633:1634:1635:1636:1637:1638:1639:1640:1641:1642:1643:1644:1645:1646:1647:1648:1649:1650:1651:1652:1653:1654:1655:1656:1657:1658:1659:1660:1661:1662:1663:1664:1665:1666:1667:1668:1669:1670:1671:1672:1673:1674:1675:1676:1677:1678:1679:1680:1681:1682:1683:1684:1685:1686:1687:1688:1689:1690:1691:1692:1693:1694:1695:1696:1697:1698:1699:1700:1701:1702:1703:1704:1705:1706:1707:1708:1709:1710:1711:1712:1713:1714:1715:1716:1717:1718:1719:1720:1721:1722:1723:1724:1725:1726:1727:1728:1729:1730:1731:1732:1733:1734:1735:1736:1737:1738:1739:1740:1741:1742:1743:1744:1745:1746:1747:1748:1749:1750:1751:1752:1753:1754:1755:1756:1757:1758:1759:1760:1761:1762:1763:1764:1765:1766:1767:1768:1769:1770:1771:1772:1773:1774:1775:1776:1777:1778:1779:1780:1781:1782:1783:1784:1785:1786:1787:1788:1789:1790:1791:1792:1793:1794:1795:1796:1797:1798:1799:1800:1801:1802:1803:1804:1805:1806:1807:1808:1809:1810:1811:1812:1813:1814:1815:1816:1817:1818:1819:1820:1821:1822:1823:1824:1825:1826:1827:1828:1829:1830:1831:1832:1833:1834:1835:1836:1837:1838:1839:1840:1841:1842:1843:1844:1845:1846:1847:1848:1849:1850:1851:1852:1853:1854:1855:1856:1857:1858:1859:1860:1861:1862:1863:1864:1865:1866:1867:1868:1869:1870:1871:1872:1873:1874:1875:1876:1877:1878:1879:1880:1881:1882:1883:1884:1885:1886:1887:1888:1889:1890:1891:1892:1893:1894:1895:1896:1897:1898:1899:1900:1901:1902:1903:1904:1905:1906:1907:1908:1909:1910:1911:1912:1913:1914:1915:1916:1917:1918:1919:1920:1921:1922:1923:1924:1925:1926:1927:1928:1929:1930:1931:1932:1933:1934:1935:1936:1937:1938:1939:1940:1941:1942:1943:1944:1945:1946:1947:1948:1949:1950:1951:1952:1953:1954:1955:1956:1957:1958:1959:1960:1961:1962:1963:1964:1965:1966:1967:1968:1969:1970:1971:1972:1973:1974:1975:1976:1977:1978:1979:1980:1981:1982:1983:1984:1985:1986:1987:1988:1989:1990:1991:1992:1993:1994:1995:1996:1997:1998:1999:2000:2001:2002:2003:2004:2005:2006:2007:2008:2009:2010:2011:2012:2013:2014:2015:2016:2017:2018:2019:2020:2021:2022:2023:2024:2025:2026:2027:2028:2029:2030:2031:2032:2033:2034:2035:2036:2037:2038:2039:2040:2041:2042:2043:2044:2045:2046:2047:2048:2049:2050:2051:2052:2053:2054:2055:2056:2057:2058:2059:2060:2061:2062:2063:2064:2065:2066:2067:2068:2069:2070:2071:2072:2073:2074:2075:2076:2077:2078:2079:2080:2081:2082:2083:2084:2085:2086:2087:2088:2089:2090:2091:2092:2093:2094:2095:2096:2097:2098:2099:2100:2101:2102:2103:2104:2105:2106:2107:2108:2109:2110:2111:2112:2113:2114:2115:2116:2117:2118:2119:2120:2121:2122:2123:2124:2125:2126:2127:2128:2129:2130:2131:2132:2133:2134:2135:2136:2137:2138:2139:2140:2141:2142:2143:2144:2145:2146:2147:2148:2149:2150:2151:2152:2153:2154:2155:2156:2157:2158:2159:2160:2161:2162:2163:2164:2165:2166:2167:2168:2169:2170:2171:2172:2173:2174:2175:2176:2177:2178:2179:2180:2181:2182:2183:2184:2185:2186:2187:2188:2189:2190:2191:2192:2193:2194:2195:2196:2197:2198:2199:2200:2201:2202:2203:2204:2205:2206:2207:2208:2209:2210:2211:2212:2213:2214:2215:2216:2217:2218:2219:2220:2221:2222:2223:2224:2225:2226:2227:2228:2229:2230:2231:2232:2233:2234:2235:2236:2237:2238:2239:2240:2241:2242:2243:2244:2245:2246:2247:2248:2249:2250:2251:2252:2253:2254:2255:2256:2257:2258:2259:2260:2261:2262:2263:2264:2265:2266:2267:2268:2269:2270:2271:2272:2273:2274:2275:2276:2277:2278:2279:2280:2281:2282:2283:2284:2285:2286:2287:2288:2289:2290:2291:2292:2293:2294:2295:2296:2297:2298:2299:2300:2301:2302:2303:2304:2305:2306:2307:2308:2309:2310:2311:2312:2313:2314:2315:2316:2317:2318:2319:2320:2321:2322:2323:2324:2325:2326:2327:2328:2329:2330:2331:2332:2333:2334:2335:2336:2337:2338:2339:2340:2341:2342:2343:2344:2345:2346:2347:2348:2349:2350:2351:2352:2353:2354:2355:2356:2357:2358:2359:2360:2361:2362:2363:2364:2365:2366:2367:2368:2369:2370:2371:2372:2373:2374:2375:2376:2377:2378:2379:2380:2381:2382:2383:2384:2385:2386:2387:2388:2389:2390:2391:2392:2393:2394:2395:2396:2397:2398:2399:2400:2401:2402:2403:2404:2405:2406:2407:2408:2409:2410:2411:2412:2413:2414:2415:2416:2417:2418:2419:2420:2421:2422:2423:2424:2425:2426:2427:2428:2429:2430:2431:2432:2433:2434:2435:2436:2437:2438:2439:2440:2441:2442:2443:2444:2445:2446:2447:2448:2449:2450:2451:2452:2453:2454:2455:2456:2457:2458:2459:2460:2461:2462:2463:2464:2465:2466:2467:2468:2469:2470:2471:2472:2473:2474:2475:2476:2477:2478:2479:2480:2481:2

ORIGINAL

Supreme Court, U.S.

FILED

OCT 4 1993

OFFICE OF THE CLERK

DISTRIBUTED

OCT 4 1993

No. 93-5256

(4)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

FREDEL WILLIAMSON,

Petitioner,

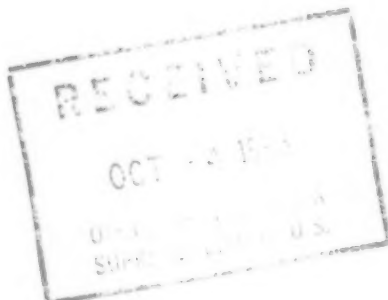
vs.

UNITED STATES OF AMERICA,

Respondent.

**ON PETITION FOR WRIT OF CERTIORARI TO
THE ELEVENTH CIRCUIT COURT OF APPEAL**

REPLY BRIEF OF PETITIONER



BENJAMIN S. WAXMAN, ESQUIRE
Counsel of Record for Petitioner Fredel
Williamson
**ROBBINS, TUNKEY, ROSS, AMSEL &
RABEN, P.A.**
2250 Southwest Third Avenue
Fourth Floor
Miami, Florida 33129
Telephone: (305) 858-9550

ROBBINS, TUNKEY, ROSS, AMSEL & RABEN, P.A., ATTORNEYS AT LAW

LAWYERS PLAZA, FOURTH FLOOR, 2250 SOUTHWEST THIRD AVENUE, MIAMI, FLORIDA 33129-2095
DADE CO. (305) 858-9550 • BROWARD CO. (305) 522-6244 • WATS (800) 226-9550 • FACSIMILE (305) 858-7491

18 pp

QUESTIONS PRESENTED

I. Whether a post-arrest confession by an accomplice implicating a defendant, offered as an admission against penal interest of an unavailable declarant under Federal Rule of Evidence 804(b)(3), bears adequate indicia of reliability to render it admissible under the sixth amendment confrontation clause?

II. Whether a post-arrest confession by an accomplice implicating a defendant, offered as an admission against penal interest of an unavailable declarant under Federal Rule of Evidence 804(b)(3), constitutes a firmly rooted hearsay exception rendering it presumptively reliable and not subject to further analysis under the sixth amendment confrontation clause?

III. Whether 804(b)(3)'s requirement that a statement must be corroborated by circumstances clearly indicating its trustworthiness, is subject to the further requirement of *Idaho v. Wright*, 497 U.S. 805 (1990), that the only circumstances that can be considered are those surrounding the making of the statement?

TABLE OF CONTENTS

PAGE(S)

QUESTIONS PRESENTED	i
TABLE OF CITATIONS	iii
SCOPE OF THE ISSUES RAISED	1
REASONS FOR GRANTING THE WRIT	1
I. THE ELEVENTH CIRCUIT COURT OF APPEALS HAS IMPLICITLY DECIDED A FUNDAMENTAL FEDERAL QUESTION IN A WAY WHICH CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT AND DECISIONS OF OTHER FEDERAL COURTS OF APPEALS.	1
A. THE CASE LAW OF THE ELEVENTH CIRCUIT WHICH PERMITS THE GOVERNMENT TO INTRODUCE AN INCULPATORY CONFESSION OF AN ACCOMPLICE PURSUANT TO FEDERAL RULE OF EVIDENCE 804(b)(3), BECAUSE IT IS A FIRMLY ROOTED HEARSAY EXCEPTION, CONFLICTS WITH <i>LEE V. ILLINOIS</i> , 476 U.S. 530 (1986), AND THE OPINIONS OF OTHER FEDERAL COURTS OF APPEALS.	2
B. THE CASE LAW OF THE ELEVENTH CIRCUIT, WHICH PERMITS THE GOVERNMENT TO INTRODUCE THE INCULPATORY CONFESSION OF AN ACCOMPLICE PURSUANT TO FEDERAL RULE OF EVIDENCE 804(b)(3) IF ITS TRUSTWORTHINESS IS DEMONSTRATED BY INDEPENDENT CORROBORATING EVIDENCE, CONFLICTS WITH <i>IDAHO V. WRIGHT</i> , 497 U.S. 805 (1990), AND OPINIONS OF OTHER FEDERAL COURTS OF APPEALS.	4
CONCLUSION	7

TABLE OF CITATIONS

<u>CASES</u>	<u>PAGE(S)</u>
<i>Bruton v. United States</i> 391 U.S. 123 (1968)	6
<i>Douglas v. Alabama</i> 380 U.S. 415 (1965)	6
<i>Fuson v. Jago</i> 773 F.2d 55 (6th Cir. 1985)	5
<i>Idaho v. Wright</i> 497 U.S. 805 (1990)	i, 4, 6, 7
<i>Lee v. Illinois</i> 476 U.S. 530 (1986)	2-4, 6
<i>Ohio v. Roberts</i> 448 U.S. 56, 100 S.Ct. 2531 (1980)	3
<i>Olsen v. Green</i> 668 F.2d 421 (8th Cir.), cert.denied, 456 U.S. 1009 (1982)	4
<i>United States v. Alvarez</i> 584 F.2d 694 and n.10 (5th Cir. 1978)	5
<i>United States v. Bakhtiar</i> 994 F.2d 970 (2d Cir. 1993)	4, 6, 7
<i>United States v. Curry</i> 977 F.2d 1042 (7th Cir. 1992)	6
<i>United States v. Flores</i> 985 F.2d 770 (5th Cir. 1993)	1, 2, 4-7
<i>United States v. Harty</i> 930 F.2d 1257 (7th Cir. 1991)	5
<i>United States v. Lilley</i> 581 F.2d 182 (8th Cir. 1978)	5

TABLE OF CITATIONS (Continued)

<u>CASES</u>	<u>PAGE(S)</u>
<i>United States v. Magna-Olvera</i> 917 F.2d 401 (9th Cir. 1990)	5
<i>United States v. Oliver</i> 626 F.2d 254 (2d Cir. 1980)	5
<i>United States v. Palumbo</i> 639 F.2d 123 (3d Cir.), cert.denied, 454 U.S. 819 (1981)	5
<i>United States v. Riley</i> 657 F.2d 1377 (8th Cir. 1981), cert.denied, 459 U.S. 111 (1983)	5
<i>United States v. Sweeley</i> 892 F.2d 1 (1st Cir. 1989)	5
<i>United States v. Taggart</i> 944 F.2d 837 (11th Cir. 1991)	1-3, 7
<i>United States v. Vernor</i> 902 F.2d 1182 (5th Cir. 1990)	5
<i>United States v. York</i> 933 F.2d 1343 (7th Cir.), cert.denied, 112 S.Ct. 321 (1991)	4

UNITED STATES CONSTITUTION AND RULES

Federal Rule of Evidence 804(b)(3)	i, 1-7
Supreme Court Rule 14.1(a)	1
United States Constitution Sixth Amendment	i

SCOPE OF THE ISSUES RAISED

Contrary to the government's assertion, the Petitioner maintains that his alleged accomplice's post-arrest confessions were inadmissible under Rule 804(b)(3). Brief for United States in Opposition (hereinafter "USO") at 4-5, 10. He clearly raised this issue in the trial court. A-2-6. The government acknowledges he raised it on appeal. USO at 4.

In this Court, while Petitioner has not phrased a Question Presented as, "whether his alleged accomplice's post-arrest confession was admissible under Rule 804(b)(3)", he has forcefully argued that Harris's post-arrest statements were wholly unreliable and, thus, inadmissible citing numerous decisions finding similar statements inadmissible under 804(b)(3). Petition for Writ of Certiorari (hereinafter "PWC") at 14. The Petitioner has specifically challenged the manner in which the Eleventh Circuit has applied 804(b)(3) to the instant case. The question of whether the statements admitted against the Petitioner satisfied the requirements of 804(b)(3) is certainly a subsidiary question fairly included within the "Questions Presented." S.Ct.R. 14.1(a).

REASONS FOR GRANTING THE WRIT

- I. THE ELEVENTH CIRCUIT COURT OF APPEALS HAS IMPLICITLY DECIDED A FUNDAMENTAL FEDERAL QUESTION IN A WAY WHICH CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT AND DECISIONS OF OTHER FEDERAL COURTS OF APPEALS.

The government argues that review should be withheld because, "though it is reasonable to conclude that the Eleventh Circuit would disagree with the analysis of the Fifth Circuit in [*United States v.*] *Flores*, [985 F.2d 770 (5th Cir. 1993),] the points of disagreement are difficult to ascertain, because the Eleventh Circuit wrote no opinion in this case." USO at 10-11. To the contrary, based on the Eleventh Circuit's decision in *United*

States v. Taggart, 944 F.2d 837 (11th Cir. 1991), the exact points of disagreement are clear. First, while the Fifth Circuit and other courts have held that "a confession by an accomplice inculcating a defendant that is being offered as a declaration against penal interest is not a firmly rooted exception," *Flores* at 775, the Eleventh Circuit, implicitly in the instant case and expressly in *Taggart*, holds that such statements do constitute a firmly rooted exception. *Taggart* at 840. Additionally, while the Fifth Circuit in *Flores* and other circuits require the corroboration of such statements, under Rule 804(b)(3) or the Confrontation Clause, to be only by circumstances immediately surrounding their making, the Eleventh Circuit appears to hold that the totality of the circumstances, including other evidence introduced at trial, can be considered. *Taggart* at 840. Thus, virtually nothing is left to the imagination regarding the ways in which the analysis of the Eleventh Circuit conflicts with, for instance, that of the Fifth Circuit in *Flores*.

- A. THE CASE LAW OF THE ELEVENTH CIRCUIT WHICH PERMITS THE GOVERNMENT TO INTRODUCE AN INCULPATORY CONFESSION OF AN ACCOMPLICE PURSUANT TO FEDERAL RULE OF EVIDENCE 804(b)(3), BECAUSE IT IS A FIRMLY ROOTED HEARSAY EXCEPTION, CONFLICTS WITH *LEE V. ILLINOIS*, 476 U.S. 530 (1986), AND THE OPINIONS OF OTHER FEDERAL COURTS OF APPEALS.

To camouflage the sharp conflict between the Eleventh Circuit's rule that inculpatory confessions of accomplices offered under Rule 804(b)(3) constitute a "firmly rooted" exception (requiring no further Confrontation Clause analysis), and this Court's implicit conclusion in *Lee* that such hearsay does not fall within a firmly rooted hearsay exception, see *Flores*, 985 F.2d at 775-76 & n.13, the government attempts to distinguish the specific circumstances surrounding the inculpatory confession in *Lee* from those surrounding Harris's

confession in the instant case. USO at 6-7. This argument misses the mark. This Court's analysis leading to the conclusion that inculpatory confessions of accomplices cannot be admitted as simple declarations against penal interests was based not on the unique circumstances surrounding the confession in *Lee* but, instead, on the nature of an entire category of statements: "We decide this case as involving a confession by an accomplice which incriminates a criminal defendant." *Id.*, 476 U.S. at 544 n.5, 106 S.Ct. at 2064 n.5. Thus, no matter what distinctions the government asserts between the statements in *Lee* and those of Harris in the instant case, it is their common nature as inculpatory confessions of alleged accomplices that controls.

This Court uses the term "firmly rooted" to describe those hearsay exceptions which "rest upon such solid foundations that admission of virtually any evidence within them comports with the substance of constitutional protection." *Ohio v. Roberts*, 448 U.S. 56, 66, 100 S.Ct. 2531, 2539 (1980)(citation omitted). Obviously, the majority in *Lee* recognized an entire category of statements, ostensibly falling within the declaration against penal interest hearsay exception, which do not comport with the substance of constitutional protection. The Eleventh Circuit's rule, as applied in *Taggart* and apparently the instant case, is directly contrary.

The government's attempt to harmonize those cases like *Taggart* holding inculpatory confessions of accomplices admissible under 804(b)(3) as a firmly rooted hearsay exception, and those cases which have rejected this categorization, is unavailing. As the Second Circuit, a court which previously held that the penal interest exception was firmly rooted, recently recognized before declining to resolve the conflict, "Some recent cases cast some

doubt on this conclusion, however, and the Supreme Court has not addressed the question." *United States v. Bakhtiar*, 994 F.2d 970, 977-78 (2d Cir. 1993)(citing *Flores* and *Olsen v. Green*, 668 F.2d 421, 427-28 (8th Cir.), *cert.denied*, 456 U.S. 1009 (1982), as cases rejecting the "firmly rooted exception" categorization). The court in *Bakhtiar* characterized the Seventh Circuit's position in *United States v. York*, 933 F.2d 1343 (7th Cir.), *cert.denied*, 112 S.Ct. 321 (1991), as being that the exception is firmly rooted only as to statements not made to limit the declarant's exposure. *Bakhtiar* at 977. Even if one attempts to harmonize the conflicting decisions from the Seventh Circuit as the government has attempted to do, USO at 8-9, n.2, it is apparent that the courts have resorted to semantical gymnastics, instead of clearly expressed doctrine from this Court, in attempting to analyze the important, recurring issue raised by the instant case.

B. THE CASE LAW OF THE ELEVENTH CIRCUIT, WHICH PERMITS THE GOVERNMENT TO INTRODUCE THE INCULPATORY CONFESSION OF AN ACCOMPLICE PURSUANT TO FEDERAL RULE OF EVIDENCE 804(b)(3) IF ITS TRUSTWORTHINESS IS DEMONSTRATED BY INDEPENDENT CORROBORATING EVIDENCE, CONFLICTS WITH *IDAHO V. WRIGHT*, 497 U.S. 805 (1990), AND OPINIONS OF OTHER FEDERAL COURTS OF APPEALS.

The government urges that "unlike in *Lee*, the district court found that [alleged accomplice] Harris's statements satisfied the requirements of Fed.R.Evid. 804(b)(3) and thus found that the statements were truly against Harris's penal interest" USO at 7. The district court's conclusion does not reflect that Harris's statements were materially different from the confession considered by this Court in *Lee*. Indeed, they were quite similar. Rather, it more graphically illustrates the contrasting rubric used by the courts in analyzing

these statements and highlights the need for a firm, clear, and uniform doctrine.

For instance, the Fifth Circuit, in analyzing inculpatory confessions of co-defendants under 804(b)(3), appears to view the statements as meeting the requirement that they be against the declarant's penal interest but finds them inadmissible as lacking in adequate circumstantial guarantees of trustworthiness. *E.g.*, *United States v. Flores*, 985 F.2d 770, 774-75 (5th Cir. 1993)(implicit); *United States v. Vernor*, 902 F.2d 1182, 1186-87 (5th Cir. 1990)(implicit); *United States v. Alvarez*, 584 F.2d 694, 701-02 and n.10 (5th Cir. 1978). Other circuits, analyzing the same types of statements, find them inadmissible because the statements are not truly against the declarants' penal interests. *E.g.*, *United States v. Magna-Olvera*, 917 F.2d 401, 407-09 (9th Cir. 1990); *Fuson v. Jago*, 773 F.2d 55, 60-61 (6th Cir. 1985); *United States v. Riley*, 657 F.2d 1377, 1383-85 (8th Cir. 1981), *cert.denied*, 459 U.S. 111 (1983); *United States v. Palumbo*, 639 F.2d 123, 127-28 (3d Cir.), *cert.denied*, 454 U.S. 819 (1981); *United States v. Lilley*, 581 F.2d 182, 187-88 (8th Cir. 1978).

Criticizing and attempting to diminish the significance of the Fifth Circuit's approach, the government argues that it has "misread" 804(b)(3) to require a showing of circumstances clearly indicating trustworthiness with regard to inculpatory confessions of accomplices. USO at 4 n.1. *See Alvarez*, 584 F.2d at 700-01. The Fifth Circuit is not alone in requiring a heightened level of trustworthiness under the rule. *See, e.g.*, *United States v. Harty*, 930 F.2d 1257, 1263 (7th Cir. 1991)(citing *Alvarez* with approval); *United States v. Sweeley*, 892 F.2d 1, 2 (1st Cir. 1989)(favorably recognizing *Alvarez*'s requirement of circumstances clearly indicating trustworthiness); *Riley*, 657 F.2d at 1383, 1385; *Palumbo*, 639 F.2d at 128 n.5, 131; *United States v. Oliver*, 626 F.2d 254, 260 (2d Cir. 1980). The Fifth Circuit decided in *Flores*,

based on the grave concerns expressed by this Court in *Douglas v. Alabama*, 380 U.S. 415 (1965), *Bruton v. United States*, 391 U.S. 123 (1968) and *Lee*, that inculpatory confessions of accomplices fail, as a matter of law, to meet this requirement. *Flores*, 985 F.2d at 783 n.27. By contrast, the decision of which the Petitioner seeks review, held without explanation, that such presumptively unreliable statements meet 804(b)(3)'s requirement of corroborating circumstances clearly indicating trustworthiness.

Acknowledging some requirement under 804(b)(3) of corroborating circumstances indicating trustworthiness, the government argues there can be no conflict between the decision below and *Idaho v. Wright*, 497 U.S. 805 (1990), because once the requirements of the rule are met, no further analysis under the Confrontation Clause is required. USO at 6. The government begs the important question raised by Petitioner: to comport with contemporary Confrontation Clause analysis, must the circumstances which 804(b)(3) requires to be considered in determining reliability, be limited to those immediately surrounding the making of the statement as prescribed by *Wright*? Some courts have superimposed the requirements of *Wright* upon the requirements of Rule 804(b)(3). *E.g.*, *Flores*, 985 F.2d at 774-77; *United States v. Curry*, 977 F.2d 1042, 1055-56 (7th Cir. 1992). Other courts appear to allow consideration of all circumstances when determining reliability under the rule but then require further analysis under the Confrontation Clause according to *Wright*. *See United States v. Bakhtiar*, 994 F.2d 970, 977-78 (2d Cir. 1993). In the instant case, different from both of these approaches, the Eleventh Circuit apparently considered the totality of the circumstances in determining reliability under 804(b)(3) and required no

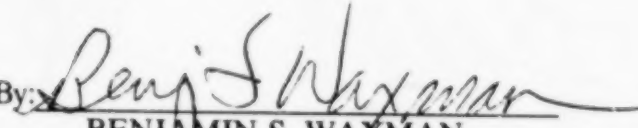
stricter Confrontation Clause analysis under *Wright*.*

CONCLUSION

There is clear conflict between the approaches of the circuit courts in analyzing the admissibility of accomplice confessions which incriminate criminal defendants. As is exemplified by the recent opinions in *Flores* and *Bakhtiar*, the courts continue to struggle with this important recurring but difficult issue. The facts of the instant case provide an illuminating backdrop against which to explore and resolve it.

Respectfully submitted,

ROBBINS, TUNKEY, ROSS, AMSEL &
RABEN, P.A.
2250 Southwest Third Avenue
Fourth Floor
Miami, Florida 33129
Telephone: (305) 858-9550


By: 
BENJAMIN S. WAXMAN

* Once again, the Eleventh Circuit's mode of analysis is apparent from its post-*Wright* decision in *Taggart*. There, in determining the reliability of statements offered under Rule 804(b)(3), the court looked to the totality of the evidence introduced at trial. *Id.*, 944 F.2d at 840. In the instant case, the Petitioner argued on direct appeal that even a consideration of the totality of the circumstances did not permit a finding of reliability under the Rule. However, indisputably, once consideration is limited to those circumstances immediately surrounding the making of the statement, no finding of reliability was possible. The circumstances surrounding the making of Harris's statements only confirmed their presumptive unreliability. PWC at 14. The decision below, affirming admission of the inculpatory confession of the Petitioner's alleged accomplice, had to rely on the totality of the evidence introduced at trial to support the finding of reliability.

PROOF OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition for Writ of Certiorari was sent by United States mail, first-class postage prepaid, pursuant to S.Ct.R. 29.3, this 30th day of September, 1993, to: Charles E. Cox, Jr., Esquire, Assistant United States Attorney, Post Office Box U, Macon, Georgia 31202, Telephone: (912) 752-3511; and, the Solicitor General, Department of Justice, Washington, D.C. 20530, Telephone: (202) 514-2000.

ROBBINS, TUNKEY, ROSS, AMSEL &
RABEN, P.A.

By: 
BENJAMIN S. WAXMAN

No. A-942

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

FREDEL WILLIAMSON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE ELEVENTH CIRCUIT COURT OF APPEAL

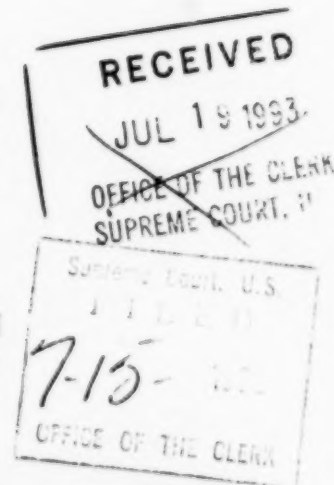
MOTION FOR LEAVE TO PROCEED ON PETITION
FOR WRIT OF CERTIORARI IN *FORMA PAUPERIS*

The Petitioner, FREDEL WILLIAMSON, by and through counsel, ROBBINS,
TUNKEY, ROSS, AMSEL & RABEN, P.A., pursuant to United States Supreme Court
Rule 39, respectfully moves this Honorable Court for leave to proceed in *forma pauperis*.

93-5256

93-5256

ORIGINAL



As grounds therefore, the Petitioner states as follows:

1. The Petitioner was charged with and convicted of federal narcotics offenses in the United States District Court, Middle District of Georgia. His convictions were affirmed by the United States Eleventh Circuit Court of Appeals.

2. The Petitioner contends that his conviction was secured in violation of his sixth amendment right to confrontation and that the decision below conflicts with decisions of this Court and other United States courts of appeal. He believes that his case presents a meritorious petition for writ of certiorari and that he is entitled to relief in this Court.

3. Leave to proceed in *forma pauperis* in this case has never been sought nor granted. However, the Petitioner has been declared indigent and appointed counsel in two subsequent cases, *United States v. Fredel Williamson*, Case No. 89-6128-Cr-JAG in the Southern District of Florida, Exhibit 1, attached, and *United States v. Fredel Williamson*, Case No. 90-00266, arising in the Northern District of Georgia.¹

4. The Petitioner has timely filed his Petition for Writ of Certification to the United States Circuit Court of Appeals, Eleventh Circuit. This Court granted his motion for extension of time making the filing deadline July 15, 1993.

WHEREFORE, the Petitioner prays that this Court enter an order granting him leave to proceed in *forma pauperis* and for relief under the Criminal Justice Act of 1964.

¹ Counsel has been unable to obtain the Order declaring the Petitioner indigent in Georgia but can supplement this record when he receives it. If these orders are insufficient to show Petitioner's indigency, an affidavit signed by Petitioner can be filed at a later date. Petitioner is currently in transit from MCC Miami to FCI Marianna and undersigned counsel has been unable to locate him and get an affidavit signed by him for this pleading.

DATED this 15th day of July, 1993.

Respectfully submitted,

ROBBINS, TUNKEY, ROSS, AMSEL &
RABEN, P.A.

2250 Southwest Third Avenue
Miami, Florida 33129
Telephone: (305) 858-9550

By: Benjamin S. Waxman
BENJAMIN S. WAXMAN
Florida Bar No. 403237

PROOF OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion for Leave to Proceed on Petition for Writ of Certiorari in *Forma Pauperis* was sent by United States mail, first-class postage prepaid, pursuant to S.Ct.R. 29.3, this 15th day of July, 1993, to: Charles E. Cox, Jr., Esquire, Assistant United States Attorney, Post Office Box U, Macon, Georgia 31202, Telephone: (912) 752-3511; and, the Solicitor General, Department of Justice, Washington, D.C. 20530, Telephone: (202) 514-2000.

ROBBINS, TUNKEY, ROSS, AMSEL &
RABEN, P.A.

By: Benjamin S. Waxman
BENJAMIN S. WAXMAN

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 89-6128-CR-JAG

UNITED STATES OF AMERICA

ORDER

vs

FREDEL WILLIAMSON

☒ Appointing Counsel
☐ Ratifying Prior Service
☐ Extending Appointment
for Appeal
☐ Substituting Counsel

(prior counsel)

CHARGE: 21:841(a)(1)

☒ Felony☐ Misdemeanor

Because the above defendant has testified under oath and has otherwise satisfied this Court that he or she: (1) is financially unable to employ counsel, and (2) does not wish to waive counsel, and because the interests of justice so require, the Federal Public Defender named below is hereby appointed to represent this defendant in the above designated case until relieved by Order of this District Court:

Federal Public Defender
301 N. Miami Avenue, Third Floor
Miami, Florida 33128
Phone: 305/536-6900

DONE AND ORDERED at Fort Lauderdale, Florida, this 27TH day of
MARCH, 1992.

Lurana S. Snow
LURANA S. SNOW
UNITED STATES MAGISTRATE JUDGE

cc: AUSA
FPD
Pretrial Services

EXHIBIT A

5

Supreme Court, U.S.

FILED

FEB 24 1994

OFFICE OF THE CLERK

No. 93-5256

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

FREDEL WILLIAMSON,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

JOINT APPENDIX

BENJAMIN S. WAXMAN *
ROBBINS, TUNKEY, ROSS,
AMSEL & RABEN, P.A.
2250 Southwest Third Avenue
Miami, Florida 33129
(305) 858-9550

Counsel for Petitioner

* Counsel of Record

DREW S. DAYS, III *
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217
Counsel for Respondent

PETITION FOR CERTIORARI FILED JULY 15, 1993
CERTIORARI GRANTED JANUARY 10, 1994

84017

TABLE OF CONTENTS

	Page
Relevant Docket Entries	1
Indictment	4
Order Granting Motion for Severance	7
Proceedings regarding co-defendant Harris' invocation of Fifth Amendment privilege, granting of immunity, and citation for contempt	9
Government's request for admission of post-arrest cus- todial statements of unavailable declarant Harris pur- suant to Fed.R.Evid. 804(b) (3)	15
Government's evidentiary proffer of hearsay through D.E.A. Agent Donald E. Walton	20
Ruling admitting post-arrest custodial statements of unavailable declarant Harris	31
Testimony of D.E.A. Agent Walton regarding de- clarant Reginald Harris' statements to him including second ruling of court confirming admission	33
Discussion of admissibility of D.E.A. Agent Walton's testimony regarding declarant Harris' post-arrest statements	45
Third and final ruling of court admitting declarant Harris' post-arrest custodial statements to D.E.A. Agent Walton	51
Cross-examination, redirect, and re-cross of D.E.A. Agent Walton	52
Motion for judgment of acquittal and denial, renewed motion to strike and denial	69
Order denying motion for new trial	70
Judgment Including Sentence	71
Order of Eleventh Circuit Court of Appeal summarily affirming conviction	78

TABLE OF CONTENTS—Continued

	Page
Order of Eleventh Circuit Court of Appeal denying Motion for Rehearing and Rehearing <i>En Banc</i>	79
Order of United States Supreme Court granting Motion for Leave to Proceed In Forma Pauperis and Petition for Writ of Certiorari	80
Order of United States Supreme Court restating first question presented	81

RELEVANT DOCKET ENTRIES

Date	Proceedings
04/12/89	Harris and Williamson INDICTMENT in 3 counts
04/26/89	ARRAIGNMENT, Both defts. PLED NOT GUILTY. (No Trial Date Set)
04/26/89	Harris MOTION TO SUPPRESS Illegally Obtained Evidence and the Fruits Thereof
05/02/89	Govt MOTION for Hearing on Conflict of Interest
05/02/89	Govt RESPONSE to Deft's Motion to Suppress
05/10/89	Harris RESPONSE to Govt's Motion for Hearing on Conflict of Interest
05/25/89	CONFLICT OF INTEREST HEARING before Judge Duross Fitzpatrick. * * *
06/01/89	Govt MOTION for Severance of Defts.
06/09/89	Harris Response to Govt's Motion for Severance and Deft. HARRIS Motion for Hearing Pursuant to Rule 14 of the F.R.C.P.
06/16/89	ORDER * * * Granting Govt's Motion for Severance (Deft. Williamson)
07/06/89	Harris SUPPRESSION HEARING before DF in Albany, Georgia. Harris stipulates non-jury trial; hearing continued until July 10, 1989; bench trial will begin at conclusion of suppression hearing July 10, 1989; MINUTE SHEET filed
07/10/89	Harris SUPPRESSION HEARING (continuation) before DF in Macon, Georgia. Govt proceeds with evidence, rests, Deft proceeds with evidence. Counsel given until 7/13/89 to file supplemental briefs. Matter set for trial 7/19/89 at 10:00 a.m. non-jury. Attached Govt and Deft exhibits sheets. MINUTE SHEET filed.
07/11/89	Williamson JURY TRIAL, Voir Dire, trial began
07/11/89	ORDER of Contempt against HARRIS for not willingly testifying in trial of Williamson

Date	Proceedings
07/11/89	MOTION compelling Harris to testify at trial of WILLIAMSON
07/11/89	ORDER compelling Harris to testify at trial of WILLIAMSON
07/12/89	Williamson JURY TRIAL, Day 2
07/13/89	Williamson JURY TRIAL, Day 3, WILLIAMSON found GUILTY on all three counts, Deft. remains in custody pending sentencing. * * *
07/13/89	Harris SUPPLEMENTAL BRIEF in Support of MOTION TO SUPPRESS
07/13/89	Govt SUPPRESSION MEMO
07/17/89	RESPONSE to Deft's SUPPLEMENTAL BRIEF in Support of Motion to SUPPRESS
07/17/89	ORDER substituting copies for originals—original exhibits in Williamson trial are needed for HARRIS trial
07/18/89	ORDER DENYING MOTION TO SUPPRESS for Deft HARRIS
11/08/89	Williamson SENTENCE (DF): 327 mos. impri. on Ct. 1; 327 mos. impri. Ct. 2; 60 mos. impri. Ct. 3; Supervised Release of 5 yrs not to possess firearms or other dangerous weapons or drugs; Deft shall not violate any other federal, state or local laws; \$150.00 mandatory assessment; no other costs or fine
11/15/89	WILLIAMSON JUDGMENT filed
11/16/89	NOTICE OF APPEAL as to judgment and sentence rendered Nov. 8, 1989.
05/10/91	11th Circuit Court of Appeals ORDER that Appellee's Motion to Remand to District Court for Evidentiary Hearing is Granted

Date	Proceedings
11/26/91	MINUTE SHEET of Evidentiary Hearing held before DF in Macon, GA; Further briefs due in 10 days
11/27/91	Govt and Williamson EXHIBIT Sheet w/attachments.
11/27/91	Williamson EXHIBIT Sheet w/attachments.
12/12/91	GOVT'S BRIEF
12/20/91	Williamson POST-HEARING MEMORANDUM on Limited Remand
05/08/92	ORDER FINDING Govt has not shown that Deft Williamson caused Deft Harris to be unavailable at trial.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

Criminal No. 89-37-MAC(Df)

UNITED STATES OF AMERICA

vs.

REGINALD BERNARD HARRIS,
a/k/a "REGGIE",
FREDEL WILLIAMSON,
a/k/a "FRED".

Violation: 21 U.S.C. § 846
i/c/w
21 U.S.C. § 841(a)(1)
21 U.S.C. § 841(a)(1)
18 U.S.C. § 2
18 U.S.C. § 1952
18 U.S.C. § 2

[INDICTMENT]

THE GRAND JURY CHARGES:

COUNT ONE

That from on or about March 1, 1989, to on or about March 26, 1989, in the Macon Division of the Middle District of Georgia,

REGINALD BERNARD HARRIS,
a/k/a "REGGIE",
and
FREDEL WILLIAMSON,
a/k/a "FRED",

did unlawfully and willfully combine, conspire, confederate, agree, and have a tacit understanding with each other and with other persons, both known and unknown to the Grand Jury, knowingly and intentionally to possess with intent to distribute and to distribute a Schedule II controlled substance, to-wit: approximately nineteen (19) kilograms of cocaine; all in violation of 21 U.S.C. § 846, in connection with 21 U.S.C. § 841(a)(1).

COUNT TWO

That on or about March 26, 1989, in the Macon Division of the Middle District of Georgia,

REGINALD BERNARD HARRIS,
a/k/a "REGGIE",
and
FREDEL WILLIAMSON,
a/k/a "FRED",

aided and abetted by each other and by other persons, both known and unknown to the Grand Jury, did unlawfully, knowingly, and intentionally possess with intent to distribute a Schedule II controlled substance, to-wit: approximately nineteen (19) kilograms of cocaine; all in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2.

COUNT THREE

That on or about March 26, 1989, in the Macon Division of the Middle District of Georgia,

REGINALD BERNARD HARRIS,
a/k/a "REGGIE",

defendant herein, aided and abetted by

FREDEL WILLIAMSON,
a/k/a "FRED",

and by other persons, both known and unknown to the Grand Jury, did travel in interstate commerce from the State of Florida, to Dooly County, State of Georgia, with intent to promote, carry on, and facilitate the promotion and carrying on of an unlawful activity, said unlawful activity being a business enterprise involving the possession with intent to distribute, and distribution, of cocaine, in violation of Title 21, United States Code, Section 841 (a)(1), and thereafter did perform and attempt to perform acts to promote, carry on, and facilitate the promotion and carrying on of said unlawful activity; to-wit: the transportation of and concealment of approximately nineteen (19) kilograms of cocaine; all in violation of 18 U.S.C. §§ 1952 and 2.

A TRUE BILL.

/s/ Dennis Z. Hunnicutt
Foreman of the Grand Jury

Presented by:

/s/ Deborah G. Fowler
DEBORAH G. FOWLER
Assistant United States Attorney
Drug Task Force/Narcotics Unit

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

(Caption Omitted in Printing)

ORDER

Pending before this court are Defendant Williamson's Appeal of Denial of Bail and Detention Hearing and the Government's Motion for Severance. Having read and considered both of these motions, the court hereby issues its ruling as follows.

* * * *

II. *Motion for Severance*

The indictment in this case charges both Defendant Harris and Defendant Williamson with drug conspiracy offenses. The Government has filed a motion to sever the two Defendants so that they can be tried separately. In support of its motion, the Government has stated that it plans to introduce certain post-conspiracy statements of Defendant Harris that are likely to incriminate Defendant Williamson. The Government contends that the introduction of these statements at a joint trial would violate the sixth amendment rights of Defendant Williamson.

After reading the arguments of both parties, the Court is convinced that these two Defendants should be tried separately. By trying the two Defendants separately, the court will avoid the possibility of violating Defendant Williamson's constitutional rights. On the other hand, the court can see no compelling reason for trying the Defendants together in one trial. For these reasons, the Government's motion should be granted.

For the reasons stated above, the court hereby . . .
GRANTS the Government's Severance.

SO ORDERED, this 16 day of June, 1989.

/s/ Duross Fitzpatrick
DUROSS FITZPATRICK, Judge
United States District Court

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

(Caption Omitted in Printing)

* * * *

[Tr. 114] MR. FOWLER: Your Honor, the Government would call Reginald Bernard Harris.

THE COURT: All right, bring Mr. Harris in.

REGINALD BERNARD HARRIS,

after being called as a witness, was administered the oath by the clerk:

MR. HARRIS: I take the 5th Amendment.

MS. SALO: Before swearing the witness, I think we need to get into the Government's motion we have been handed about five minutes ago.

THE COURT: All right.

MS. FOWLER: If your honor please, if we may go first, as it is our witness, at this time I would like the record to reflect that the jury is out and that this is done outside their presence and that Reginald Bernard Harris' two attorneys are here in the courtroom with him, that they have previously advised the attorney for the Government that Mr. Harris intends to take the 5th Amendment, that he has in fact just taken the Fifth.

We filed a motion with the Court asking for a compulsion order. Attached thereto is the approval of the Deputy Assistant Attorney General of the United States Department of Justice, and we would ask that the Court sign the compulsion order pursuant to the position of Title 18 U.S.C., Section 6001, et seq.

[Tr. 115] It is my understanding as well from Ms. Salo, who represents Mr. Harris, he intends to take the Fifth,

and if he so states to the Court, once the compulsion order is signed, we would request that the Court advise him if he continues to, continues to say he will take the Fifth, we have got an order to ask that he be held in contempt. That is, to pull dead time until such time as he complies with the Court's compulsion order.

THE COURT: Ms. Salo.

MS. SALO: Mr. Adams.

MR. ADAMS: Your Honor, I'm Ed Adams. The Government has filed a motion to compel under 6001, but my client has invoked the privilege against self incrimination, and that must be sustained unless it is perfectly clear that any testimony he will give will not be used against him to incriminate him. The Government has not come forward to show that. Unless they bring in some evidence that the testimony he gives will not be used to incriminate him in future trials, any testimony he has, any testimony, he has that right to invoke the privilege.

THE COURT: Mrs. Fowler.

MS. FOWLER: Your Honor, the nature of a compulsion order is just that, it is compelled testimony, and it would be subject to suppression at any other hearing in which it is raised, because it is compelled. That is the purpose of an [Tr. 116] immunity order, that is the purpose of it having to be approved by the Justice Department, and that is the purpose of it being an order from the Court. It says that it will not be used against him and that he is being compelled, and we provided case law earlier to the law clerk about how this protects him. That is the reason we sought this and that is the reason we prepared it for the Court, because it does compel him and it prohibits it from being used against him in another proceeding, and I will state for the record as well, Your Honor, this morning we filed a sealed package—

MR. SILVER: I don't have a copy.

MS. FOWLER: —a sealed package of evidence to be filed with the Court, of the evidence we had against Reginald Bernard Harris before this trial begins, so if any

issue arises down the road as to this issue, this evidence being used against him, there is a sealed copy in the Court's file of what evidence we had on Reginald Bernard Harris before this compelled order.

THE COURT: It is your position this testimony here today will not be used against him?

MS. FOWLER: Cannot, Your Honor, either way.

MR. ADAMS: Your Honor, that would be fine, but as we all know, Mr. Harris is a co-defendant in this and he is facing a bench trial before you on July the 19th. This evidence might be not used against him, but it surely will be [Tr. 117] heard by you. I think the cases will show that any time that any evidence that might be incriminating, it cannot be, I know you will do your best to disregard all the testimony, but I think that would be hard to do.

THE COURT: I tell the jury to do that all the time and I'm convinced they do. I certainly think I can.

MR. ADAMS: As far as the order goes, I see no mention of immunity that she referred to. She said she had an order in here that any testimony would not be used against him. I do not see that, not in the document she gave me.

MS. FOWLER: Your Honor, it is stated in the statute, it refers to the statute in the order, and the statute is self explanatory, and as I understand it, he is going to continue to take the Fifth, even after being ordered, so the chance of the Court hearing anything from him is nill.

THE COURT: I never have had anybody take the Fifth on oath before, so I have a feeling he is planning to do it.

MR. ADAMS: I would cite to the Court United States versus Dapcie, which the cite is 664 Fed 2d 75. This is a 5th Circuit case, which gives him the right to, if the defendant reasonably apprehend a risk of self incrimination if he testifies, he may properly invoke the privilege.

THE COURT: Does that contemplate 18 U.S.C. 6001.

MR. ADAMS: Yes, sir.

[Tr. 118] THE COURT: Let me see it.

MR. ADAMS: You might have to pull that case, Your Honor.

THE COURT: U.S. versus Andre Dapcie? Well, the first thing I notice in the, it says he was reversed, the Judge was reversed, the Court of Appeals, Judge Tjoflat, said District Court had no independent authority to bestow use of immunity on a witness. Isn't that different? Did Judge, did this judge have this use of immunity from the Department of Justice as we have here?

MS. FOWLER: No, Your Honor. The Justice Department is the only one can give immunity from prosecution, and that is the purpose of the approval, so that the Court can order it. What that case says is that the court cannot, on his own motion, say, "Well, if you will talk, I will immunize you."

THE COURT: It seems to me that—

MS. FOWLER: That case is distinguishable.

THE COURT: Distinguishable from this one for that reason alone, in that I am not doing, I'm only acting in pursuant to 6001, et seq.

MR. ADAMS: Also, Your Honor, you asked us to look up whether any testimony he gave could be used by the State of Georgia. I'm not able to cite any cases, so we are not sure whether it can or not, so we would also invoke it on [Tr. 119] that, the testimony he gives here might be able to be used by the State of Georgia.

MS. FOWLER: Your Honor, we would cite in re grand jury proceedings of Hardman, which is at 757 Fed 2d, 1580, that states state courts are required to respect immunity granted under the federal witness immunity statute and that the immunity is co-extensive with 5th Amendment and subplants it, thus witness granted immunity is not entitled to take the Fifth Amendment.

THE COURT: All right, let me see it. It looks to me to be right on point with what we have here.

MR. ADAMS: That case also refers that the state can only grant the immunity granted by the Government.

THE COURT: No, what this case says, if this Court, through 18 U.S.C. 6002, grants immunity, then the State has to respect it, the State cannot use it. That is the way I, the way I read it. So, it's my opinion that if Mr. Harris is protected by the authority from this Department of Justice granting him this immunity, that he is protected against prosecution in this court based on whatever he may say today, and he is also protected in any state court based on whatever he may say today. Any evidence that they may have developed up to this point, this moment in time, is, of course, not covered by the immunity. Unless you have something further, I'm prepared to compel him to testify and if he doesn't do [Tr. 120] so, I will find him in contempt. I'm going to give you a moment to confer.

MR. ADAMS: Thank you. Your Honor, for the record, since the order does not mention what type immunity he is being provided today, we would like to clear that up.

THE COURT: Well, he is being provided whatever is set out in 18 United States Code, Part 5, immunity of witnesses, Section 6001, through 6005. Of course, that deals with congressional proceedings, but in particular, it seems to be 6002, 6003. It encompasses whatever is in that, those two sections.

MS. FOWLER: If Your Honor please, just for the record, the immunity would cover any questions that we ask him or that he was asked on cross examination in this hearing only.

THE COURT: Yes. I mean, it's immunity from what he says. Anything you have independently of what he says is not covered.

MR. ADAMS: Your Honor, based on the fact we do not feel he has sufficient immunity, my client wishes to invoke the Fifth.

THE COURT: All right. Mr. Harris, you have heard your lawyer and I assume you understand that is his advice to you. I'm going to have to tell you that the Court does, in spite of your lawyer's statement, require you to answer. [Tr. 121] Now, if you do not answer the questions, do not give testimony, you will be found in contempt of court. If you are found, you are already in custody, but if you are found in contempt of court, the time that you serve will not be counted in your favor as time served. It is what they call dead time. So, I am going to tell you that you are required by this Court, by lawful order of this Court to give testimony. Will you do so?

THE WITNESS: I take the Fifth, sir.

THE COURT: All right. I think that, I certainly don't, I won't try to change your mind. I do find Mr. Reginald Bernard Harris in contempt of court for failure to give testimony after immunity has been granted and order of compelling testimony has been issued. Today is the 11th?

THE CLERK: Yes, sir.

MS. FOWLER: Your Honor, for the marshal's clarification, that dead time will begin as of this moment.

THE COURT: Yes.

MS. FOWLER: Until such time as he purges himself of contempt. Is that correct?

THE COURT: That's correct. All right, you may go down.

MS. SALO: Your Honor, just for the record, 18 U.S.C. 6003 states that he can only be found in contempt and held in confinement until the proceedings—not 18, 6003, [Tr. 122] excuse me, 28, I had it here, I can get you the code cite, but it only allows, it is, under the contempt law, it only allows you to keep him in confinement until such time as these proceedings have stopped.

THE COURT: Well—

MS. SALO: So we ask—

THE COURT: He will be held, the dead time will continue so long as it is allowed and required by law,

whatever that is. Mrs. Fowler, I don't want to take the time, at least for now, we can decide how long that lasts at some other time.

You may go down.

(Witness excused).

THE COURT: We will take another witness. I guess you have one?

MS. FOWLER: There is just one more brief matter we can take up outside the presence of the jury.

MS. SALO: Your Honor, excuse me just one second. The code cite on that was 28 U.S.C., 1826.

THE COURT: 28, 1826?

MS. SALO: Yes.

THE COURT: Well, I don't have it here. Shall we proceed?

* * * *

MS. FOWLER: Yes, sir. Your Honor, we would ask under Federal Rules of Evidence, 804, hearsay exception, to [Tr. 123] declare as unavailable, that Reginald Bernard Harris be declared unavailable and that we be allowed to call Agent Walton to admit his statements. We cite the case of United States v. Robinson, which we previously provided to the Court, at 635 Fed 2d, 363, 5th Circuit, 1981.

THE COURT: I can't put my hand on it. Is that the one that was on the back of that?

LAW CLERK: Yes, sir.

MS. FOWLER: Which states witness made prior statement, but at trial refused to testify, and was held in contempt but preferred jail to testifying; and his statements previously were against interest because he implicated himself, and that they were against his penal interest because they stated his involvement in a drug conspiracy, and that he is unavailable because he refused to testify and had to be jailed. We would ask to call Agent Walton to admit his statements pursuant to 804—

THE COURT: Mr. Silver?

MR. SILVER: Judge, I'm looking at this brief that Mrs. Fowler has provided me, and I don't see the case that she has made reference to, something about Robinson.

THE COURT: 635 F 2nd, 364.

MS. FOWLER: I'm sorry, Your Honor, I believe Mr. Silver has the 404 brief.

MR. SILVER: Right.

[Tr. 124] MS. FOWLER: I didn't provide a brief.

MR. SILVER: I'm sorry, I thought you said that was what you were referring to.

MS. FOWLER: I'm referring to a case of U.S. v. Robinson.

MR. SILVER: I don't have that, Judge, so I can't respond to what she is saying.

THE COURT: Well, here it is. Why don't we take, take a moment or two and look at it. We will be in recess about five minutes while you examine that.

MR. SILVER: Thank you, Judge.

(Brief recess).

THE COURT: All right, Mr. Silver, have you got any comment?

MR. SILVER: Judge, on behalf of defendant Williamson, it would seem to me that Agent Walton's testimony still is not admissible against this defendant, and some of the objections that I would have thereto, first and foremost is, we don't know whether or not this statement, if in fact they did obtain a statement from Reginald Bernard Harris, whether or not it was obtained legally. We don't know whether or not any promises were made, since apparently, and I'm only assuming this, Judge, that if they obtained a statement from Reginald Bernard Harris, it was obtained from him during the time that he was in custody.

[Tr. 125] THE COURT: Well, I think it would be incumbent upon them to indicate it was made after Miranda warning was given and there were no promises or threats, wouldn't you, Mrs. Fowler? Do you—

MS. FOWLER: We cite United States v. Sims for the Court, headnote two. "A co-defendant cannot allege a constitutional violation, a defendant cannot allege a constitutional violation of a co-defendant, and is not a matter properly before the Court." It states even if they violated a co-conspirator's rights, that a defendant has no standing to assert that in his own defense.

That is United States versus Sims, 845 Fed. 2d, 1564.

THE COURT: That seems to be what it says, Mr. Silver.

MR. SILVER: Secondly, Judge, we would object further that this would in effect prohibit Mr. Williamson the right of effective cross examination of the co-defendant Harris and it would violate his 6th Amendment right to confrontation of Mr. Harris.

THE COURT: Now, the Government tried.

MR. SILVER: Yes, I understand.

THE COURT: In other words, it would seem to me that the Government has done all it can do to get Mr. Harris' testimony. Mr. Harris will not testify. I just wonder [Tr. 126] whether or not, after the Government has done all that it can do to procure the testimony and still can't get it, I mean, what if Mr. Harris was in jail, for instance, I don't want to say he was dead, because that might raise some other problems, but let's assume that Mr. Harris is in jail in some other country, incommunicado. You have got your denial of right of cross examination, or confrontation, but still, the Government can't do anything about that.

Isn't that—I tried, just as a matter of an antedote, I tried, myself, one time a very interesting case dealing with the right of confrontation. I think if it had been tried now it would have been reversed, where one co-conspirator was left in jail by the Government, by the State, while there were four conspirators, while another conspirator came to court and said my client killed these people in ambush because the other guy over in jail told him so.

In other words, he couldn't be cross examined because he didn't know anything except what the guy over in jail testified to. They wouldn't put him on the stand. I think that was a classic denial of right of confrontation, and the Government had it in its power to put him on the stand. They decided to feed his testimony through this other agent who said, "All I know is what he told me." But I don't know, I think they have done all they can do in this case.

[Tr. 127] MR. SILVER: And, Judge, finally, the case that Your Honor so kindly permitted me to review during the break, of United States versus Robinson, it appears, having read that decision, that this testimony should not be admitted at this time in this trial because the Court there adopts and uses the following expression, that it is admissible under 804, parenthesis, B, parenthesis, parenthesis three, parenthesis, only if corroborating circumstances clearly indicate the trustworthiness of the statement. So we don't, we don't know that yet.

THE COURT: Well, you don't mean corroborating testimony, but circumstances. In other words, if the Government can show me that there is likelihood that this is trustworthy testimony, is that your position?

MR. SILVER: Judge, the Court uses the words corroborating circumstances.

THE COURT: Now, what I'm saying, that means that if they had said corroborating testimony, such as with a confession, I think, but what I'm saying is, what you are saying is, Mrs. Fowler has the obligation to convince the Court that the agent's testimony is going to be trustworthy. Is that right?

MR. SILVER: I think that not only must she convince the Court that his testimony is going to be trustworthy, but it must, that his testimony must be [Tr. 128] corroborated.

THE COURT: I don't think so.

MS. FOWLER: If Your Honor please, it has to show that Reginald Harris' is corroborated. In United States

versus Alvarez, which is the second case we provided, which we will let Mr. Silver look at, it says that examples of corroboration can be found in Government's exhibits, i.e., plane tickets, receipts. We have already introduced such things as that.

THE COURT: But it doesn't require corroborating testimony.

MS. FOWLER: No, sir, it does not.

THE COURT: I don't think it does, either. I mean, I don't think, I think they, if they had meant testimony, they would have said it, because it's clear that in a confession you have to have corroboration.

MR. SILVER: Well, Judge, isn't that what the Government seeks to do here, because certainly from what I have read, from what has been provided me, the Government extracted a confession from Mr. Harris.

THE COURT: But there is corroboration. Well, my feeling is that the testimony is admissible; that Mr. Harris is unavailable. Where is the language in this Robinson case you are pointing to?

MR. SILVER: Judge, I think it was on the second [Tr. 129] page, if I'm not mistaken.

THE COURT: 364?

MR. SILVER: I think it is, sir.

THE COURT: Okay. It seems to me like we probably need to have a little hearing on that before we bring it in, and I think we ought to just go ahead and let this jury go and take care of that this afternoon in-camera.

MS. FOWLER: We have no objection, Your Honor.

THE COURT: We will still finish on time, won't we?

MS. FOWLER: Yes, sir.

THE COURT: All right, bring the jury in, please. I believe the best, I believe in an abundance of precaution, we need to put Mr. Walton on the stand and let you, I'm going to let you have at him and see whether or not the corroborating circumstances are there, and then I will rule on it. Bring the jury on in.

* * * *

[Tr. 131] DONALD E. WALTON,
after being first duly sworn, testified as follows:

BY MS. FOWLER:

Q Tell us your name, please, sir.

A Donald E. Walton.

Q And Mr. Walton, are you a special agents with the Drug Enforcement Administration?

A Yes, ma'am, I am.

Q How many years of law enforcement experience do you have?

A Approximately nine.

Q Did you have occasion—Your Honor, I'm going to try to go through the foundation questions quickly.

Did you have occasion on Sunday, March 26th, 1989, to interview Reginald Bernard Harris?

A Yes, ma'am, I did.

[Tr. 132] Q Is that the same Reginald Bernard Harris that just took the 5th Amendment before this Court?

A That's correct.

Q Did you read him his Miranda rights before you interviewed him?

A Yes, ma'am.

Q What did you use to read those rights to him?

A A standard form, DEA form 13A that is provided to me by the Drug Enforcement Administration, that I carry with me.

Q Did he indicate a willingness to talk to you?

A Yes, ma'am, he did.

Q And what specifically did he tell you about an attorney?

A He stated specifically, after having been provided the rights contained on that card, that he did not want an attorney present.

Q Now, was that here in this courthouse?

A Downstairs in the Marshal's Service office.

Q And that is after he had been arrested, is that correct?

A Yes, ma'am.

Q In connection with the 19 kilograms?

A That's correct.

Q Did you threaten him in any manner?

A No, ma'am.

[Tr. 133] Q Did you promise him anything?

A No, ma'am.

Q Did he freely give you information about Fredel Williamson?

A Yes, ma'am.

Q Now, have you examined some of the physical evidence in this case, the items taken from the vehicle?

A Yes, ma'am.

Q And did you see numerous exhibits with the name Fredel Williamson on them?

A Yes, ma'am.

Q As well as that, have you received independent information that there were two individuals in Atlanta waiting on this shipment of cocaine from Fredel Williamson?

A Yes, ma'am.

Q And was that provided to you by two witnesses in Atlanta?

A Yes, ma'am.

MS. FOWLER: Your Honor, rather than go into the statements, I think all we have to establish is there is some corroborating information and that can be in the form of paperwork, and we would not take the time, the Court's time to go through all the context of what he told Agent Walton.

THE COURT: I'm going to let Mr. Silver cross examine him and get into whatever he wants to.

[Tr. 134] MS. FOWLER: Your Honor, we previously provided Mr. Silver a summary of everything that he told Agent Walton.

BY MR. SILVER:

Q Agent Walton, what time was it that you talked with Reginald Bernard Harris?

A As I recall, it was in the early evening hours or late afternoon hours, sometime after 5:00.

Q Sometime after 5:00 on what day?

A The 26th of March.

Q And how long had he been in custody at that time?

A It is my understanding that the traffic stop occurred at approximately 10:55, between 10:30 and 11:00 o'clock, the same day, that morning, and he was taken into some type of full custody shortly after the cocaine was discovered. I suspect sometime shortly after 11:00 that morning.

Q Do you know who talked with Mr. Harris between the time that he was arrested at approximately 10:55, and the time that you got around to talking to him at approximately 5:00 p.m. on March the 26th.

MS. FOWLER: Your Honor, we object to the relevance. We are not offering anything he made to any other agents or any other witnesses, and we contend that is completely irrelevant as to agent Walton's testimony. We are not offering that, that is not before the Court. It is not going to be offended into evidence and it has no bearing on [Tr. 135] what the Court is looking at. That is, whether there are any corroborating circumstances to Harris' statement.

THE COURT: Mr. Silver, what do you say?

MR. SILVER: Judge, they must demonstrate, as I understand the case that I read, they must demonstrate that this statement was given freely and voluntarily without the threat of punishment or hope of reward, et cetera. And this man was held, by this officer's own statement, on testimony, this man was held for approximately six and one half hours before he had an opportunity to talk to him. So he doesn't know what, if anything, anybody said. Someone could have said to him, you know, "You should

cooperate and they are going to give you a gold metal on the courthouse grass."

THE COURT: Well, I'm going to let you ask the question. I'm going to tell you, though, that I'm not going to assume a negative. I mean, assume a positive from a negative, because he cannot say under oath that someone else didn't promise him the moon, that probably somebody did promise him the moon. I mean, that would be—I'm going to allow the question.

BY MR. SILVER:

Q What question did you ask Mr. Harris concerning whether or not he had been made any promises concerning his cooperation, by any other agent or law enforcement officer?

A I don't recall having asked him any question like [Tr. 136] that.

Q So, how can you conclude that this statement and cooperation that he gave you was freely and voluntarily given?

A The one he gave to me?

Q Yes, sir.

A There was certainly no duress or coercion or anything of that nature on my part during the time that I took the statements from him.

Q Well, this was on the telephone, wasn't it?

A No, sir.

Q This was in person?

A Yes, sir.

Q And during that period of time you don't know what happened in that, roughly speaking, six and a half hours from the time he was arrested, until the time you talked with him?

A I don't know all the things that may have happened to him. I talked to him on the telephone one time prior to the time that I talked to him downstairs in the Marshal's Service office.

Q And did you ask him whether or not there had been any threats made against him?

A No, sir.

Q Did you ask him whether or not there had been any promise of hope of reward extended to him?

[Tr. 137] A No, sir.

Q Did you determine whether or not he had been kept in duress?

A Nothing of that nature was ever brought to my attention and I made no inquiry of that.

Q Did you determine whether or not he had been allowed to consult with an attorney?

A During the first conversation, or the second one?

Q Either one or both, sir?

A In the first conversation I made no attempt to discover that. In the second conversation I asked him specifically if he wanted an attorney here, or present while I was talking to him.

Q And what did he say at that time?

A He said, "No, sir."

Q And didn't sometime later in that interview he tell that you he did want an attorney?

A Yes, sir.

Q At what point in time during this discussion did he tell you he wanted an attorney?

A In the conversation that we had downstairs?

Q Yes, sir.

A At the very end of the conversation.

Q At the very end?

A Yes, sir.

[Tr. 138] Q Was any part of this discussion that you had with Mr. Harris, was any part of it recorded electronically?

A No, sir.

Q Was any part of it recorded in writing and subsequently signed by Mr. Harris?

A He wouldn't provide a statement, a written statement, no, sir.

Q Mr. Walton, what is the significance of the fact that Harris asked you whether or not the conversation was being recorded?

A During the telephone conversation that I had with him?

Q Yes.

A I have no idea that was in his mind.

Q You told him the conversation was not being recorded?

A I told him that I was certainly not recording it and that I had no knowledge whether or not the Dooly County Sheriff's Office was or was not.

Q Did you obtain such knowledge whether or not Dooly County Sheriff's Office recorded it?

A I was told that there was no tape recording or recording of the conversation that I had with him made by Dooly County.

Q Do you know of any statements that Special Agent Stephens made with reference to Mr. Harris' willingness to assist in the investigation, what statements Mr. Stephens [Tr. 139] could have made to Mr. Harris to induce that?

MS. FOWLER: Your Honor, we object. There is no showing he was present or overheard it or has any knowledge of it.

THE COURT: Well, I will let him answer the best he can. Objection overruled.

BY MR. SILVER:

Q Sir?

A I'm sorry, would you repeat that, please.

Q Yes, sir. I would say, Mr. Walton, what information were you given as to Special Agent Stephens, his interview with Mr. Harris as to whether or not Mr. Harris agreed to willingly cooperate and provide assistance to the investigation?

A My understanding is, from talking to Agent Stephens, is that he had a one-way conversation with Mr. Harris at the Dooly County Sheriff's Office and told him

that if he wished to cooperate, that he would be put in touch with either myself or a DEA agent or an Assistant United States Attorney who could explain to him what cooperation meant and what in turn he might receive to his benefit for that, and he was—

Q I'm sorry?

A He was subsequently put in touch with me by telephone, at his request.

Q What promises did the agent make as to what reward [Tr. 140] Harris would receive for cooperation in this case?

A It is my understanding Agent Stephens provided him with no promise of any reward of any type for his cooperation.

Q Didn't Agent Stephens tell Harris that if he cooperated, that it would be documented on his behalf and relayed to the Assistant United States Attorney that would be handling this matter?

A I believe he did say that, as well as myself having said the same thing when he arrived here.

Q What does that mean? Does that mean you are going to give this information, and doesn't that normally dissolve itself into lenient treatment on behalf of the Assistant United States Attorney's Office?

A No, sir. I think it is exactly what it says.

THE COURT: What was the statement?

MR. SILVER: Judge, that Agent Stephens relayed to Harris that Harris' cooperation in this matter would be documented for his behalf and relayed to the Assistant United States Attorney that would be handling this matter.

THE COURT: All right, who is Agent Stephens, again?

MR. SILVER: He is the gentleman that just previously testified, Judge, in this case.

THE COURT: That's right. And he is the GBI Agent?

[Tr. 141] MR. SILVER: Yes, sir.

THE COURT: And he had interviewed Harris before Walton?

MR. SILVER: Yes, sir, he did, sir.

THE COURT: And you knew about that, you knew that he had told him that?

THE WITNESS: No, sir, I didn't know that at the time I talked to Agent Stephens on the telephone from my office in Columbus to Agent Stephens at the Dooly County Jail.

THE COURT: When did you find out that he had told Harris that this would be taken down and passed on to the U.S. Attorney's Office?

THE WITNESS: That he had actually told him that?

THE COURT: Yes.

THE WITNESS: It was sometime later, Your Honor.

THE COURT: After you talked to Harris?

THE WITNESS: Yes, sir.

THE COURT: Okay.

THE WITNESS: If I may, Agent Stephens is somewhat knowledgeable of our procedures, sir, federal agents' procedures in that regard, and he may very well have done that.

THE COURT: Okay. Let's move on.

BY MR. SILVER:

[Tr. 142] Q And finally, Mr. Walton, at any time during this interview that you were having with Mr. Harris did he tell you that he wanted to stop the interview and confer with counsel?

A Yes, sir.

Q And at what point in time was that?

A At the very end of the interview.

Q And what information had you gleaned prior to that?

A From Mr. Harris?

Q Yes.

A That he had traveled to Fort Lauderdale, Florida on or about the 22nd or 23rd, as I recall, of March, to

attend a wedding or a funeral, and/or a funeral, of a friend of Fredel Williamson's in Fort Lauderdale. He told me that the cocaine was arranged for, the acquisition for the cocaine was arranged for by Fredel Williamson in Fort Lauderdale; that the cocaine belonged to Fredel Williamson; that he was supposed to take it back at Atlanta, Georgia and deposit it in a dumpster located behind a service station and simply to depart, someone was supposed to come pick it up after that.

Q Was that the first thing he told you, or the second thing he told you? Didn't he first tell you something about a Cuban?

A During our, during the telephone conversation he may have mentioned a Cuban, but he did tell me that he, he first [Tr. 143] told the police, as I recall, or told us that, told me that he had been playing basketball and had, after doing so, had gone to his motel room and laid down, and that he got up, excuse me, that his luggage was already in his car parked in the parking lot. He said he got up, he later changed that, said got up after playing basketball, took his luggage down to the car, that he didn't have a key to the car, the car was open, that he opened the trunk with an opening device in the glove box in the interior of the car, and when he opened the trunk, that he saw the cocaine in there with a note attached that had been left there by a Cuban whose name he couldn't provide at the time, a Cuban subject that he had seen with Fredel Williamson in Atlanta before, and with instructions on that note from the Cuban to go to a pay telephone and call a number that appeared on the note. He said he did that and after doing so, destroyed the note.

Q And who did he make that statement to?

A He made that statement to me.

Q He made that statement to you? Had he previously made it to some other law enforcement officer?

A As I understand, he did make that statement or something similar to that, yes, sir.

Q To another law enforcement officer?

A As I recall, yes. I would have to check my notes, but as I recall, it was something to that effect, a story similar [Tr. 144] to that, I guess.

Q And that was prior in time to the, to your second conversation. Is that correct?

A (No Response).

Q I'm looking for a sequence of events.

A Yes, sir. I'm having a difficult time recalling. I'm not clear in my mind that he did make those statements to other officers, but he did make the statements to me and the Marshal's Service downstairs. The only statement he made to me prior to that, in the telephone conversation, very brief conversation I had with him on the telephone, was that he was supposed to take the cocaine to Atlanta, be there by 10:30 that night, and that it belonged to Fredel Williamson.

Q And do you know, Mr. Walton, at what point in time was all of this information obtained? If he asked for counsel and the right to confer with counsel, at what point in time did he make that request? Do you have anything to document a point in time?

A A point in time for the time he provided the information, or the time—

Q Yes, sir.

A Or the time he requested an attorney?

Q From the time he provided you the information, at what point in time did he request an attorney?

A Are you talking about the telephone conversation [Tr. 145] information?

Q No, sir. I'm basically looking for when did he say that he wanted to talk to the attorney?

A He made that statement to me at about, I would say sometime after 6:00 in the evening.

Q And you had been talking to him, roughly speaking, 30 minutes or an hour at that point?

A Depending on the exact times, I would say the entire conversation between Mr. Harris and myself was

less than an hour's duration, and that statement by Mr. Harris terminated the conversation between Mr. Harris and myself.

MR. SILVER: Thank you, Mr. Walton.

MS. FOWLER: Just briefly, Your Honor.

THE COURT: All right.

BY MS. FOWLER:

Q Agent Walton, his requesting a lawyer came after he talked with his stepfather. Is that correct?

A According to Mr. Harris, that's who he spoke to on the telephone, yes, ma'am.

Q In your presence, you overheard Reginald Harris' end of the conversation?

A That's correct.

Q When he ended that conversation, is that when he told you he wanted a lawyer?

A Yes, ma'am stated he no longer wished to cooperate, [Tr. 146] wouldn't sign any documents, any forms.

Q Did you quit questioning him at that point?

A Abruptly. It stopped and it was over.

Q Now, while he was talking to you, did he tell you he was scared of Fredel Williamson and other people involved in this?

A He stated he was scared not only for himself but for his mother, frightened that they would be, either he or his mother would be killed, that Williamson knew where both he and his mother resided, they lived together.

Q He lived with his mother?

A According to Mr. Harris, yes, ma'am.

Q And did he complain to you about any, any agent having threatened him or any deputy having harmed him in any manner?

A No, ma'am.

Q His only fear was to Fredel Williamson and the other people related to the drug conspiracy, is that correct?

A The only fears he expressed to me, yes, ma'am.

MS. FOWLER: One moment, Your Honor. Nothing further, Your Honor.

THE COURT: Anything further, Mr. Silver?

MR. SILVER: Nothing further, Judge, thank you.

THE COURT: All right. It is the ruling of the Court that the necesasry corroborating circumstances as spelled out in the case of United States versus Robinson, 635 [Tr. 147] F 2nd 363, have been met by the Government. It is clear to me that Agent Walton read him his Miranda rights. He was in custody. However, it does not appear that there was any coercion. The fact he had been in custody for six or seven hours does not give this Court any concern. The Court notes that he was in custody here in the federal courthouse in Macon, and this Court knows that the facilities here and the way prisoners are treated in this courthouse generally comply with all aspects of requirements of the various Supreme Court decisions, and so the presumption is that he was not under any, as far as I'm concerned, as far this Court is concerned, under any coercion or under such circumstances that he would not give a voluntary statement.

For that, and just based on the testimony of the agent in total, and there is a record here of it in case any appellate court ever needs to look at it, this Court finds that the corroborating circumstances clearly indicate the trustworthiness of the statement. So, when we begin in the mornings, I will, we will begin, I assume, with this agent's testimony.

Anything further before we adjourn for the day?

MS. FOWLER: Not for the Government.

MR. SILVER: Judge, on behalf of the Defendant Williamson, in reviewing that information which we have obtained from the Government by way of discovery, we are [Tr. 148] advised here that apparently Special Agent Stephens initiated the telephone call to Special Agent Wal-

ton from the Dooly County, Georgia Sheriff's Office, and that there is some considerable time elapsed before Mr. Harris was transported to the United States Marshal's Office in Macon, Georgia.

In addition thereto, Judge, it advises us that at the conclusion of the conversation between Harris and Special Agent Walton, Special Agent Walton again spoke with Special Agent Stephens and had, and informed him that Harris had provided the stated information regarding the controlled delivery and requested Stephens to transport Harris to the United States Marshal's Service office in Macon, Georgia. Special Agent Stephens said he would in fact transport Harris to Macon, and that he had monitored Harris' portion of the telephone conversation with Walton.

So apparently, Judge, a considerable period of time elapsed before he was actually transferred to the Marshal's Office in Macon, Georgia.

THE COURT: Well, the thing the Court is relying on is the statement was given here at the Marshal's Office in Macon, at the federal courthouse. The Court, when it comes to circumstances, and let me make it absolutely clear, the Court does not assume that the Dooly County Sheriff's Office would be any less sensitive to Mr. Harris' constitutional rights insofar as any statement or confession [Tr. 149] that is given, but the Court is more familiar with the, with the procedures here at the courthouse in Macon than it is in the Sheriff's Office in Dooly County. But it appears to me that the relevant time period is here, when he was here and where he was here and what was done when this statement was made to Agent Walton. So, the ruling will stand.

* * * *

[Tr. 174] DONALD E. WALTON,
after being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MS. FOWLER:

Q Tell us your name, please, sir.

A Donald E. Walton.

Q Mr. Walton, how are you employed?

A As a special agent for the Drug Enforcement Administration.

Q And, Agent Walton, how many years of law enforcement experience do you have?

A About nine years.

Q And how many years of experience do you have with the Drug Enforcement Administration?

A Going on six, seven.

Q What are your duties with the Drug Enforcement Administration?

A To investigate violations of the federal narcotics laws, specifically Title 21 of the United States Code.

Q Mr. Walton, I direct your attention to Sunday, March 26th, 1989. Did you receive a call in reference to this case on that day?

A Yes, ma'am, I did.

Q And did you have a conversation on the phone with a Reginald Bernard Harris?

[Tr. 175] A Yes, ma'am.

Q Do you recall approximately what time that was?

A It was around the noon hour of the 26th.

Q And where were you located when that conversation took place?

A At my office in Columbus, Georgia.

Q And to your knowledge, where was the person you were talking to located?

A At the Dooly County Sheriff's Office in Dooly County, Georgia.

Q Now, what conversation did you have with Reginald Bernard Harris.

MR. SILVER: Objection, if Your Honor pleases, and I would like to go into the grounds, outside the jury, please, Judge.

THE COURT: Why don't we step in chambers, they have been up and down enough.

MR. SILVER: That will be fine, sir.

THE COURT: You can stand and stretch or whatever.

(Brief recess).

(Chambers Conference).

THE COURT: Mr. Silver.

MR. SILVER: Judge, I would renew my objection to Agent Walton's testifying in this case, based upon that which we went through yesterday. And in addition thereto, Judge, I [Tr. 176] would also object to the testimony of Agent Walton with reference to that which he now attributes to Mr. Harris, on the grounds that that is hearsay as to Mr. Williamson. And, Judge, it is made after Mr. Harris is in custody, so that means that the conspiracy, if there was one, terminated at the time that he was taken into custody, and so Walton's testimony may be good against Harris, but it is not against Williamson.

THE COURT: Mrs. Fowler?

MS. FOWLER: Your Honor, we went through yesterday immunizing Harris, and he went in dead time and the Court found—

THE COURT: I have already ruled.

MS. FOWLER: You have already ruled.

THE COURT: I ruled on that. The narrow question here is, Mr. Silver's position is that obviously when Mr. Harris was arrested, that the conspiracy terminated.

MS. FOWLER: Yes, sir.

THE COURT: And therefore, anything, I'm just posing the question, I said therefore, anything he said

after the conspiracy terminated is inadmissible under the rule that it was not made during the pendency of the conspiracy. Now, how do you respond to that?

MS. FOWLER: It is not offered as being admitted during the pendency of the conspiracy. I agree the [Tr. 177] conspiracy had ended when one of them is arrested, as to the one arrested. It doesn't necessarily end as to the others. It is offered under the unavailable exception, and the Court has gone through all the predicates of reliability and the Court has ruled that its coming in under that unavailable exception to the hearsay requirement, and the cases—

THE COURT: I know, but that is not the question that I have already ruled on. I want to know, does it make any difference that he, that the testimony that is offered was made, the conversation was had after the conspiracy had terminated? Does that make any difference?

MS. FOWLER: No, sir.

THE COURT: Why?

MS. FOWLER: Because it is in under a different rule. We are not offering it during the pendency of the conspiracy. We are offering it under the unavailable.

THE COURT: Well, I don't think you understand what I'm saying.

MS. FOWLER: The Court—

THE COURT: My feeling is this, is that it is, although the conversation, the interview was, with Agent Walton and Mr. Harris, was made after the conspiracy terminated, that it involved the gist of the conversation, it involved—the gist of the conversation dealt with things that happened during the pendency of the conspiracy. [Tr. 178] Therefore, he can recount what Williamson may have done or the two of them may have done together or planned together or did together at a time before the arrest. Anything he says about Williamson, that happened after the termination of the conspiracy, if there is any such thing, and as I recall what the agent said, it all

dealt with that part that, that whatever they did in planning and so forth. That is what, I think Mr. Silver's motion was that the mere fact that a conspiracy had terminated, means that anything he says after the termination of the conspiracy is inadmissible. That is your point, isn't it, Mr. Silver?

MR. SILVER: Yes, Judge. It is admissible as to Mr. Harris.

THE COURT: But not against any other?

MR. SILVER: Yes, sir.

THE COURT: I don't agree with you. I think it is admissible against Harris and Williamson, so long as Harris is testifying as to what involvement Williamson had during the pendency of the conspiracy. So, I'm going to let it go. I overrule the objection.

MR. SILVER: Thank you, Judge.

THE COURT: Your exception is preserved.

(Chambers Conference Concluded).

THE COURT: You may proceed.

BY MS. FOWLER:

[Tr. 179] Q Agent Walton, did you have a conversation with Reginald Bernard Harris on the phone on March 26, 1989?

A Yes.

Q And I believe, since we have been out and come back in, you said you were in your office in Columbus and he was, as you understood it, at the Dooly County Sheriff's Office?

A Yes, ma'am.

Q What did he tell you, please, sir, and what did you ask him?

A I was attempting to gather information from him at that point necessary for myself and other agents involved in the investigation to conduct a controlled delivery of 19 kilograms of cocaine that had been seized from a car that he was driving.

Q Tell us what a controlled delivery is.

A A controlled delivery is exactly what is says. It is a delivery of cocaine seized from a person or persons, that is delivered or attempted to be delivered in a controlled situation by agents or police officers of some type to unsuspecting persons who would have normally retrieved it, or received it, I should say, at which time, of course, they would be arrested, too.

Q All right. And what specifically did you ask him about a controlled delivery?

A Whether or not it was possible. In a very brief [Tr. 180] conversation he stated that he had been to Fort Lauderdale, Florida; had obtained 19 kilograms of cocaine from an unidentified Cuban subject in Fort Lauderdale; that the acquisition for the cocaine had been made by Fredel Williamson of Atlanta; and that the cocaine was to be delivered that night, the 26th, at 10:30 to a dumpster located behind a service station on Redan Road in the Atlanta area.

Q And did he identify for you who the cocaine belonged to?

A He stated the cocaine belonged to Fredel Williamson.

Q Once he told you that, what did you do?

A I asked him to return the telephone to GBI Agent Fred Stephens who was there, and instructed Agent Stephens to transport Mr. Harris to Macon here, to the United States Marshal's Service office downstairs, where we would gather and begin appropriate planning for the controlled delivery with which Mr. Harris agreed to do.

Q Okay. And did Agent Stephens agree to bring him to Macon?

A He did.

Q And did you then come to Macon?

A Yes, ma'am.

Q So, did you meet in person with Reginald Bernard Harris?

[Tr. 181] A Yes, ma'am. Later that evening, or during the early evening hours of the 26th here in the Marshal's Service office downstairs.

Q I show you the drivers license of Reginald Bernard Harris that has been admitted as Government's Exhibit 2. Is that the same Reginald Bernard Harris that you met with?

A Yes, ma'am.

Q And did you have an in person conversation with him, one on one, in person?

A Yes, ma'am, I did.

Q What, if anything, did you advise him as to his rights?

A I did in fact do that. I advised him of his constitutional rights as provided me on a form issued to me by the Drug Enforcement Administration.

Q Are those commonly known as his Miranda rights?

A Yes, ma'am.

Q And did he indicate a willingness to speak to you?

A He did.

Q And what did he tell you about having rented the car, please, sir?

A He stated that he had rented the car just a few days earlier, prior to making the trip from the Atlanta area to Fort Lauderdale, Florida on the 22nd or 23rd of March, and that after doing so, had traveled to Fort Lauderdale to [Tr. 182] attend a wedding and/or a funeral of a friend or friends of Fredel Williamson, and that Fredel Williamson and his girlfriend, or his mother, named Wanda, would also be in the Fort Lauderdale area, and he included his name on the rental contract for the automobile, which we had.

Q That who had included whose name?

A That Mr. Harris had included Fredel Williamson's name on the rental contract because he was going to be in the Fort Lauderdale, Florida area with him.

Q Because who was going to be in Fort Lauderdale?

A Because Mr. Williamson was going to be in Fort Lauderdale.

Q With Mr.—

A With Mr. Harris.

Q All right. And what, if anything, did he tell you about the delivery of the cocaine to Atlanta, the controlled delivery?

A He stated that it was to be delivered by him to a dumpster, a trash bin, if you will, at a, in the parking lot of a Crown service station on Redan Road in the Atlanta, Georgia area at 10:30 on the night of the 26th, and that he was simply supposed to deposit the cocaine in the dumpster, return to his car and depart the area and was not supposed to await the arrival of anyone to pick it up.

Q And what did he tell you about where he had gotten the [Tr. 183] cocaine?

A He stated he had gotten it or received it from an unidentified Cuban male subject, an acquaintance of Fredel Williamson, in Fort Lauderdale who had placed the cocaine in the trunk of the rental car and left some instructions attached to the cocaine to telephone for further instructions on the delivery of the cocaine, what to do with it.

Q Okay. And at that point did you attempt to make plans for the controlled delivery?

A Yes, ma'am. When I realized we had considerable time, that being that conversation having occurred during the early evening hours of the 26th and the delivery time the same day was some four or five hours later, at 10:30 p.m., there was enough time to amass the number of agents needed for such an attempt of a controlled delivery, and I got up from the desk where I was seated in the Marshal's Service and started toward the door to in fact do that, and Mr. Harris stopped me and explained that, "I can't let you go, I can't let you go up there." He said, "That's not true," and stopped me from amassing the agents for the delivery.

Q Okay. Were you in a position to observe him when he was telling you this?

A I was seated right in front of him, or had gotten up from the desk and was walking to the door.

Q Would you stand and show us how he told you that, and [Tr. 184] what, if any, hand signals he used?

A He got out of his chair, he was seated in a chair next to the desk, and he got out of the chair and walked, took a half step toward me as I was approaching the door and just said, you know, "I can't let you do that," threw his hands up and said "that's not true, I can't let you go up there for no reason."

Q When he told you that, what did you do?

A We reconvened for another short conversation there regarding what the truth of the matter was with respect to the ownership and the delivery process of the cocaine, and Mr. Harris stated that what he had previously stated about a delivery to a trash dumpster was all false and that the information about the Cuban was false, the telephone conversation and the note attached to the cocaine was false, and that the cocaine was being delivered by him to Fredel Williamson in Atlanta who, at the time Mr. Harris was stopped on the interstate in Dooly County, was traveling in front of him in another rental car, of Mr. Harris in a Lincoln Continental, and after being stopped, that Mr. Williamson continued up the interstate northbound, made a U turn, came southbound on the interstate, made another turn and continued northbound behind or past the location of the stop and observed Mr. Harris stopped by the trooper, excuse me, by the deputy, with the trunk of the automobile up.

[Tr. 185] Q So, what he told you was that Fredel Williamson—

MR. SILVER: Objection, if Your Honor please, to the United States Attorney summarizing what she believes to be this witness' testimony.

MS. FOWLER: We will withdraw that, Your Honor.

THE COURT: All right, move on.

BY MS. FOWLER:

Q Agent Walton, what did he tell you about whether or not Fredel Williamson knew he had been stopped?

A He stated that was the reason for stopping me from gathering the agents necessary for the delivery, because Mr. Williamson had observed him being stopped and subsequently with the trunk of the car up, where the 19 kilograms were located, and that was the reason that a controlled delivery was impossible, that Mr. Williamson already knew that it had been seized and that he had been arrested.

Q And what, if anything, did he tell you about the arrangements for securing the cocaine and the arrangements for transporting the cocaine?

A That that had been made, or the arrangements for the acquisition and the transportation had been made by Mr. Williamson.

Q Now, did he make any phone calls while you were there?

A Yes, ma'am, he made two.

Q And did you overhear his end of the conversation? [Tr. 186] A Mr. Harris', yes, ma'am.

Q And who did he call?

A He first telephoned his sister in Atlanta to obtain a telephone number for—

MR. SILVER: If Your Honor please, I will object to that, because of the grounds previously stated in the conference in which the Court has issued certain directions concerning testimony in this matter. And also, Judge, that this would be, if I understand him correctly, this is what now amounts to, he is listening to only one side of a conversation. He doesn't know what the individuals on the telephone said. He only knows what he heard Mr. Harris say.

MS. FOWLER: Your Honor, that is all we are asking, what is the side he heard.

THE COURT: I'm not sure I understand the first part of your objection, Mr. Silver. Do you want to approach the bench?

MR. SILVER: Yes, I would, Judge.

(Bench conference).

MR. SILVER: Maybe I'm wrong, but I thought I heard the Court say that his testimony should cease at the time that he had finished explaining what the involvement was during the arrangements, as you have indicated, the actual plan, as you have indicated, not anything that happened after the arrest. That is what she seeks to go into now.

[Tr. 187] MS. FOWLER: What I'm seeking to show, Your Honor, he turned to the agents and said, "My sister said Fredel Williamson has already called and told them I have been caught with cocaine," it is what Harris turned and told the agent. The agent obviously didn't hear the other end of the conversation, but it corroborates what he is saying about Harris, excuse me, Williamson being ahead of him. Williamson had already made it to Atlanta and called his sister before he had time to even tell his family that he had been stopped with the cocaine, and Williamson had already told them.

THE COURT: I tell you what, back up a little bit and start at the beginning of this contested testimony and let me hear it again. I'm not going to send the jury out. I can tell them not to, if I feel like it's inadmissible, I will tell them to put it out of their mind. I'm convinced they can do so. So let's back up and do it that way. I will rule after I hear what she is going to say.

(Bench Conference Concluded).

BY MS. FOWLER:

Q Agent Walton, did Mr. Harris have a telephone conversation, you say he had two conversations?

A Yes, ma'am.

Q And you obviously couldn't hear the other end of the conversation. Is that right.

THE COURT: When was this conversation?

[Tr. 188] Q When was the conversation?

A It was after he had provided me the information regarding the attempted delivery and subsequently the truth of the matter.

Q What time, what date?

A It was the 26th, excuse me, early evening hours of the 26th.

THE COURT: Where were you?

THE WITNESS: In the Marshal's Service office downstairs.

THE COURT: Was that the original conversation, the interview?

THE WITNESS: The entire conversation lasted no more than 20 to 30 minutes, at the most.

THE COURT: Was there any break between, was this all part of the first interview you had with him?

THE WITNESS: Person to person interview, yes, sir. I had one prior telephone, very brief telephone conversation with him while he was still at the Dooly County Sheriff's Office.

THE COURT: That was earlier that day?

THE WITNESS: Yes, sir.

THE COURT: But your interview with him was here around 5:30 or so on the evening of Easter afternoon?

THE WITNESS: Yes.

[Tr. 189] THE COURT: And that is when you tried to set up this controlled delivery, all of what was done during this interview in the Marshal's Office?

THE WITNESS: Yes, sir.

THE COURT: And then he changed his mind about that, about the controlled delivery?

THE WITNESS: About the facts that he had originally stated, which were false.

THE COURT: Then what happened after he says, "That's not true, I can't let you go up there"?

THE WITNESS: He told me that it was impossible and the reasons for the impossibility of the controlled delivery. He requested at that point he be allowed to make a telephone call, which at that point, knowing the controlled delivery was no longer possible, I had no objection to him making a call.

THE COURT: So he made a phone call?

THE WITNESS: Yes, sir, he made two of them.

THE COURT: You sat there and overheard them?

THE WITNESS: Absolutely.

THE COURT: You overheard one end of the conversation, you heard what he said, you didn't hear what the others said?

THE WITNESS: That's correct.

THE COURT: All right. Now, that is where you are.

[Tr. 190] BY MS. FOWLER:

Q Who did he tell you he was calling the first time, Reginald Bernard Harris?

A Prior to the conversation, the first telephone call he made, he told me he needed to call or had to call his sister in Atlanta to get a telephone number where he could call his mother in Ohio.

Q Okay.

A And after the conversation, we discussed the contents of the conversation that he had with the person on the phone.

Q And what did he tell you his sister said?

A He further confirmed the impossibility of a delivery, in that his sister had informed him, somebody, a female, an unidentified female caller had already called her or called the house or called the number he called where his sister was and told her he had been arrested for drugs, Mr. Harris, that is.

* * * *

[Tr. 215] I believe that takes care of that. The next question is the statement Reggie Harris made after custody, which implicated the defendant. I read the case that you, I believe it is U.S. versus Harrell. Mr. Silver, have you read the Harrell case?

MR. SILVER: Yes, I have, Judge.

THE COURT: Do you want to comment on it?

MR. SILVER: Judge, what the Court did was find that the playing of the tape was permissible and that it could be received in evidence, and they based that on two points. One being that the declarant who was on trial made the statement against interest, as I read this decision.

[Tr. 216] THE COURT: I agree with you so far.

MR. SILVER: And secondly, that they also allowed it on the grounds it was a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy, and that has been my position all along, Judge, that this statement was not made during the course—

THE COURT: Well, on page 1526—

MR. SILVER: Yes, sir, I'm reading that. It says, "We need not consider whether 801(D)(2)(E), the co-conspirator rule, applied here because we conclude that the evidence was admissible under the rule permitting the admission of a statement against interest. His admissions clearly were against his penal interest."

THE COURT: I'm making this observation to both of you. It is obvious to me that the Court is not saying in Harrell that these two other guys made any admission. I mean, you can't, they did not give this guy a proxy to make an admission for him. I think the admission is only against the one who made the statement, but the two people who were not quoted made no admission. Now, the Court then goes on to say they don't consider the co-conspirator rule. And then it goes on to say, "We are satisfied the trial court adequately instructed the jury as to the manner in which the tapes and transcripts should be used."

I don't get a whole lot of guidance out of it. [Tr. 217] Mrs. Fowler, what should I get out of this case?

MS. FOWLER: Your Honor, we do not contend whatsoever that the statements were made during the course of the conspiracy. Therefore, the co-conspirator exception to the hearsay rule is not before the Court. I think this case addresses what may be before the Court, and that is, in essence, what we are admitting is a confession of Reginald Harris that implicates a co-defendant after Harris' arrest.

THE COURT: All right, I understand, but is it required that this statement be made during the pendency of the conspiracy?

MS. FOWLER: No, Your Honor. It is a confession by Harris. It is after the conspiracy, and—

THE COURT: What about this 2nd Circuit case?

MS. FOWLER: Well, first of all—

THE COURT: Which says it has got to be during the pendency.

MS. FOWLER: Your Honor, it does have to be to come in as a co-conspirator statement, but we are clearly not offering it, we are telling the Court the conspiracy is over as to Reginald Bernard Harris. There is no way it is in pendency.

THE COURT: It is not coming in as a co-conspirator statement?

MS. FOWLER: That's correct, Your Honor.

[Tr. 218] THE COURT: It is not coming in as an admission by the defendant Williamson?

MS. FOWLER: No, it is not an admission by the defendant Williamson.

THE COURT: Then what is it?

MS. FOWLER: It is a hearsay exception under 804 B(3), and we have met the predicate and the Court has already ruled that in, because we have determined that Reginald Bernard Harris is unavailable (that is 804 back there, not 404) and is unavailable. I think we are talking about a Bruton problem. That is where a confession im-

plicates the party speaking, Mr. Harris and his co-defendant. And Bruton holds that extrajudicial statements of one defendant not otherwise admissible, and we fall within that category, we are otherwise admissible under 804 B(3). In other words, the discussion under the case we cite, which is the Harrell case, we contend falls squarely, that Bruton doesn't control and the co-conspirator exception doesn't control because the Court has already determined that we have met the requirements for the 804 B(3), unavailable and statement against interest.

THE COURT: As to—

MS. FOWLER: As to the whole statement.

THE COURT: As to Harris, as far as Harris is concerned, he is unavailable. It is a statement against his [Tr. 219] interest. I let it in as a co-conspirator statement. Now I am concerned that since, that when the statement was made, the conspiracy had ended, that this case, the one involving the Chinese defendant, that it, that it says no. Now you say it comes in under the Bruton decision.

MS. FOWLER: No, sir. I think I said, as I interpret Mr. Silver's objection, he says it's not a statement in furtherance of the conspiracy, and I agree with him totally. It is not offered under that exception. A statement must only be admissible under one hearsay exception, to come in. It doesn't have to meet all the—

THE COURT: Let me, I don't want to cut you off. Are you telling me it comes in under 804 B(3)?

MS. FOWLER: Yes, sir.

THE COURT: Let me read that again.

MS. FOWLER: And, Your Honor, in support of that, the discussion of the Harrell case is very similar to our case, where he implicates himself and other people, and it goes on to explain Bruton, which would otherwise keep that testimony out.

THE COURT: Bruton is a conspiracy case, right?

MS. FOWLER: Bruton is where one co-defendant, one co-defendant implicated another, and the Government tried—

THE COURT: I thought you just told me it wasn't a Bruton, we don't have a Bruton.

[Tr. 220] MS. FOWLER: We don't, and this case says why.

THE COURT: Which case is that?

MS. FOWLER: Harrell, page 1526.

THE COURT: Let me, let's take it one step at a time. 804 B(3) is a statement against interest. There is no statement by Fredel Williamson, so therefore under 804 B(3) it does not come in.

MS. FOWLER: Yes, sir.

THE COURT: The only way a statement can come in, as I see it, is a statement by Harris that implicates him as a co-conspirator.

MS. FOWLER: Your Honor, this case is just in opposition to what the Court just said.

THE COURT: All right, let's go over it slowly, I'm a slow learner. Where is it?

MS. FOWLER: It's at page 1526, United States versus Harrell, it starts with discussion, up at the top of the page.

THE COURT: Give me the language, the smoking gun language here.

MS. FOWLER: It says, "Appellant's complaint of introduction of a tape in which a statement by one defendant implicated one or more other defendants."

THE COURT: Who were not present.

MS. FOWLER: Right, who were not present at the [Tr. 221] table. They contend the trial court erred in denying motion to redact. The same motion was made on behalf of Mr. Harrell, who was also not there. They said that under Bruton, the Court should eliminate the names of the co-defendants.

Now, the trial court said that the statements were admissible under statements against interest, and obviously they didn't make those, they weren't there, we can tell that by them objecting, by the objection they made. Now, the Court goes on to say, recognizes Bru-

ton says that an extrajudicial statement of one defendant, such as Reginald Harris, not otherwise admissible, and that is italics, because that is the exception we are under, were not otherwise admissible.

THE COURT: In other words, since the co-conspiracy rule is, co-conspirator rule is not in effect.

MS. FOWLER: Bruton prohibits defendant's statement against others. We are talking about a 6th Amendment right to confrontation.

THE COURT: I understand.

MS. FOWLER: And the trial court admitted the exhibits under 804 B(3). Obviously the evidence was admissible under either rule, and that is where we qualify. Bruton does not control, because of the Bruton exception. And then it says, "We need not consider whether the [Tr. 222] co-conspirator rule even applies, because the evidence is admissible under the rule permitting the admission of a statement against interest."

THE COURT: That is, I understand that insofar as the guy who, the one who did the talking is concerned. But why does—

MS. FOWLER: He is talking about these other people.

THE COURT: Why does it say over here—

MS. FOWLER: What paragraph is that?

THE COURT: Page 1527, down on the right-hand column, next to the last.

MR. SILVER: Next to the last paragraph.

THE COURT: There is a Biggins case.

MS. FOWLER: That is whether the Court should allow a recording to be played. You see, Biggins discusses whether a recording should be played. The fifth line from the top of the page, on the right-hand column, 1527.

THE COURT: Okay. Well, I'm not completely satisfied. I'm going to, I don't have to rule now anyway. I will rule later. I have already let it in, but I have, I mean, the testimony is already in evidence and my deci-

sion is whether or not I should leave it as it is, or should I reverse my ruling. I want to get the jury back in here. I'm going to send my trusty clerk out, tell him to go to work on [Tr. 223] this thing. Is there anything else you want to say, Mr. Silver? I think we have probably done all we can do.

MR. SILVER: In the Court's opinion in Harrell, Judge, the Court here states on page 1526, it says, "The trial court admitted the exhibits under rule 804 B(3)," which is the statement against interest, "and under 801 (D)(2)(E), which is the statement by a co-conspirator of a party during the course and in furtherance of the conspiracy." I think it is clear what the Court says here. Your Honor's deliberation, as I have understood it, is the statements made after the conspiracy had terminated.

THE COURT: All right. One more word.

MS. FOWLER: Just briefly.

THE COURT: One more word.

MS. FOWLER: We are talking about apples and oranges. A statement made during the course of a conspiracy is separate and apart from an admission made after an arrest, and that is what we are talking about.

THE COURT: A rose by any other name is still a rose, and what we have here is some very damning evidence that is either going to come in or not going to come in and it doesn't really make a whole lot of difference what you call it.

MS. FOWLER: Well, the rule provides for what we produced, and the Court heard evidence on it yesterday under [Tr. 224] the 804 B(3), and the Court ruled it in. We contend that the 2nd Circuit case is not controlling, for two reasons. First of all, we have an 11th Circuit case that explains it, which is controlling.

THE COURT: The 11th Circuit says we don't consider the co-conspirator rule.

MS. FOWLER: Yes, sir, because it comes in under another. There is nothing that says it has to meet all the hearsay exceptions, and we are not offering it, we clearly say it is not.

THE COURT: You had two points. Give me the other one.

MS. FOWLER: The first one is we are not offering it under co-conspirator. The second is, 2nd Circuit law is not controlling in the 11th Circuit.

THE COURT: If one is clearer than the other, I'm going to follow the clearer one. I agree with you, the 2nd Circuit, if this is an 11th Circuit case on point, I shouldn't go to the 2nd Circuit, although I might add editorially that some of the finest judges in the country are in the 2nd Circuit.

MS. FOWLER: And if Your Honor please—

THE COURT: Second only to those in the 11th Circuit.

MS. FOWLER: If the Court determines that it has [Tr. 255] been improper for this witness to say those statements, then the Court must of necessity declare a mistrial, because there is no way they can remove what he has heard, what they have heard that Reginald Harris said about Fredel Williamson, and the Government will join in the motion with Mr. Silver, because I think that would be a burden no one could overcome in the 11th Circuit.

THE COURT: Well, we will take that up later. Bring the jury in.

(Jury returned to the courtroom).

* * * *

[Tr. 232] THE COURT: All right, I have this written down, because I want to be sure I say the right words. The ruling of the Court is that the statements made by defendant Harris to Agent Walton are admissible under 804 B(3), which deals with statements against interest.

First, defendant Harris' statements clearly implicated himself, and therefore, are against his penal interest.

Second, defendant Harris, the declarant, is unavailable.

And third, as I found yesterday, there are sufficient corroborating circumstances in this case to ensure the

trustworthiness of his testimony. Therefore, under United States versus Harrell, these statements by defendant Harris implicating defendant Williamson are admissible.

I do not totally understand the logic of the 11th Circuit. However, that is their logic and I am bound by it and I will follow it. That's the ruling of the Court. Bring the jury in.

CROSS EXAMINATION

BY MR. SILVER:

[Tr. 233] Q Agent Walton, when was the first time that you talked with Reginald Harris?

A Sometime just after noon, between 12:00 and 1:00 on the 26th.

Q On March 26th, '89?

A Yes, sir, by telephone.

Q That is the first time you have talked with him?

A By telephone, yes, sir.

Q Had you met him in person any time prior to March 26th, '89?

A No, sir.

Q Describe Mr. Harris, please, to the Ladies and Gentlemen of the jury. How old is Mr. Harris?

A I believe he is 23 years old.

Q And where did he reside, if you know?

A In the Atlanta, Georgia area.

Q Do you know the street number, the address?

A I don't have it in front of me.

Q And was he married?

A No, sir, not to my knowledge.

Q Was he employed?

A No, sir, not to my knowledge.

Q Do you know how much schooling or education that he had?

A I believe I was provided that information. If I'm not [Tr. 234] mistaken, it was a high school education.

Q High school? Do you know whether or not he graduated from high school?

A I don't recall specifically, no, sir.

Q Do you know whether or not he had had any previous trouble with the law?

A Do I know that now, or did I know that when I talked to him the first time?

Q Either now or, either now or when you talked to him the first time?

A I didn't know then, and I don't believe he has a prior record, that I know of now.

Q I see. Now, did he give you any evidence, Mr. Walton, as to his personal reliability? Did he give you the names of any individuals that you could call to check him out to determine his personal reliability?

A No, sir.

Q Now, when you first talked with him, Agent Walton, what was his attitude? Did he appear to you that he was talking to you freely?

A Yes, sir.

Q And the first conversation you had with him was on the telephone?

A Yes.

Q And was that when he told you about that he had found [Tr. 235] the cocaine in the trunk of the car, and the story about the Cuban and all of that?

A In some words, yes, sir.

Q In some words? What do you mean by that?

A Not exactly as you stated it there.

Q Well, that's what I'm trying to get across. Did he make some statement, the first time he talked with you, that you later learned was not true?

A Yes, sir.

Q Okay. Then that's what I'm after. When did he make that statement to you that you later learned was not true?

A In a very brief or terse fashion during the telephone conversation at midday, and repeated that same

information in more detail during my personal interview with him in Marshal's Service office downstairs the same evening.

Q And he had also had opportunity to talk to other police officers before you were interviewed?

A Yes, sir.

Q And do you know whether or not he related that same story to them?

A I have not been told that that information was passed to anyone but myself.

Q Okay. Now tell, relate to the Ladies and Gentlemen of the jury what it was that he first told you.

A During the telephone conversation?

[Tr. 236] Q Yes, sir.

A He had requested of Agent Stephens, the GBI agent that was present at the Dooly County Jail, to contact me by telephone and have me gather what information would be needed, if possible, to attempt a controlled delivery of the 19 kilos. I spoke with him for a very short period of time. During that conversation he told me he had acquired the cocaine from an unidentified Cuban male subject in the Fort Lauderdale, Florida area. He told me he was to take the cocaine to the Atlanta area—

Q Let me interrupt you, if I could, please, Agent Walton, and I will try not to interfere with you, and I apologize to you and to the jury for interrupting you. When he gave you this, this unidentified Cuban male subject, did he give you the name of that individual?

A He provided—not at that time. He provided me with a name later. The unidentified Cuban male subject is my language. He simply said he didn't know the name of the person that, that he believed was Cuban, who had put the cocaine in the car.

Q But did he eventually give you the name relating to that unidentified male Cuban?

A He provided me with a name, yes, sir.

Q What was the name that he gave you?

A Shawn.

[Tr. 237] Q Shawn?

A Yes.

Q And what other information did he give you about Shawn when he told you about this particular incident? What else did he tell you about Shawn?

A That he was an associate of Fredel Williamson and that he had met him before with Williamson in Atlanta.

Q That he had met Shawn with Williamson, is that correct?

A I don't recall specifically if it was Shawn, but it was concerning the conversation regarding a Cuban subject that had placed the cocaine in the car, according to Mr. Harris.

Q Did he identify Shawn as being a Cuban, or did he identify Shawn as being a Bahamian?

A There was discussion at one point between Mr. Harris and myself as to whether or not he could distinguish the difference between a Cuban and/or a Bahamian or Jamaican, that type. And I don't recall specifically if Shawn was a Bahamian or Jamaican or Cuban, or what. At that moment, for my purposes, it was, it was unimportant.

Q And did he tell you where he believed Shawn lived?

A He may have, but I don't recall.

Q Did he tell you that he believed that Shawn lived in the Fort Lauderdale, Florida area?

[Tr. 238] A He could very well have said that, either Fort Lauderdale or Atlanta. I believe he did say Fort Lauderdale.

Q And, Agent Walton, how much time did it take Mr. Harris to relate these circumstances to you in this manner that you have described?

A A matter of two minutes, three minutes.

Q And you believed him, didn't you?

A I don't know that that's what I believed. It was enough information for me to act on.

Q Yes, sir. And in fact, you were going to act on it?

A I did act on it, yes, sir.

Q And then how much time elapsed before he got around to telling you, "No, disregard what I have said to you, don't go with that," or don't do that?

A How much time elapsed from the time he made those statements to me in the telephone conversation?

Q Yes, sir.

A The same information again in more detail was related to me downstairs here, and after having made those statements here, when I got up to leave the room to set the delivery in motion, his response was immediate, that it was untrue.

Q And how long did it take him to get around to telling you that what he had been telling you was untrue?

A (No Response).

Q How long was that interview before he said to you, [Tr. 239] "Look, what I have been saying is not true"?

A The personal interview?

Q Yes, sir.

A The entire conversation between Mr. Harris and myself lasted no more than 20 to 30 minutes, I suppose. A lot of that time was me talking to him. And again, when he clarified the truthfulness of that information, it came at the very end of the conversation when we were about to put the delivery in motion.

Q All right, sir. And did he also tell you, during that same period of time, Agent Walton, that he had obtained the approximately 19 kilograms of cocaine in Fort Lauderdale?

A Yes, sir.

Q He told you that?

A Yes, sir.

Q And he also told you this Cuban male subject had placed the cocaine in the trunk of his automobile. Did he not tell you that?

A He stated he thought that was how it got there, yes, sir.

Q And did he also tell you at that time that the cocaine was to be delivered by him, Harris, to a trash dumpster located behind a Crown service station on Redan Road in Atlanta, Georgia?

A Yes, sir, he did.

[Tr. 240] Q He told you that?

A Yes.

Q And he was supposed to do this by 10:30 p.m. that night?

A Yes, sir.

Q Was it reasonable, Mr. Walton, Agent Walton, he could have gotten from Dooly County, Georgia to Atlanta, Georgia in the Redan Road area in the time remaining from the hour he was arrested, until the time designated to be in Atlanta?

A It would have been about ten and a half hours. I suspect he could have driven much farther.

Q That was ample time for him to do what he said he had to do?

A Yes, sir.

MR. SILVER: One second, please, Judge.

Q Agent Walton, you indicated in your direct examination that Mr. Reginald Harris also made a statement that Mr. Williamson was proceeding in another rental car. Did he tell you where Mr. Williamson rented that other car?

A No, sir.

MR. SILVER: Thank you, Judge. I have no other questions of the witness.

MS. FOWLER: Your Honor, might we briefly approach the bench?

THE COURT: Yes.

[Tr. 241] (Bench conference).

MS. FOWLER: I believe Mr. Silver has opened the door for us to ask him why Reginald Harris said he lied at first, and we anticipate the answer being that he was scared.

THE COURT: What?

MS. FOWLER: We believe Mr. Silver has opened the door about why Reginald Bernard Harris lied, and we intend to ask the agent why Reginald Bernard Harris told him he lied, and we expect the answer to be because he was scared of Fredel Williamson. We thought we better bring that to the Court ahead of time. We think he asked him twice about his attitude, and that he had lied in the first story and we think we are entitled to ask him what the boy said about why he lied.

MR. SILVER: Judge, I don't think so. I stayed entirely within the direct examination. I didn't go outside of it. He at first indicated that the man had made those statements to him and that they were inconsistent and the man told him don't go through with the project.

THE COURT: Let me ask you this. Did he tell Walton why he changed his story?

MS. FOWLER: Yes, sir.

THE COURT: When did he do that?

MS. FOWLER: During this conversation, during, right in the middle of it. When they got ready to do the [Tr. 242] delivery, he said, "I lied, I don't want you to make this delivery, I'm scared of these people and that is why I lied to you about it." He said, "I can't make it because Fredel already knows I have been caught," and he said, "It's Fredel's dope," and he asked Mr. Walton what was the man's attitude, and I think his attitude is one of fear and I think we are entitled to bring that out.

MR. SILVER: To the contrary, he said the man's statement was made freely. He didn't say there was any fear.

THE COURT: I think we do have an inconsistency here. He made one statement and he changed it and said

something else. The jury, if there was a reason given for changing his story, I think the jury has a right to hear it, even though it is based on his fear. If it is based on his fear of the defendant, then so be it, I can't, you know—

MR. SILVER: Judge, I didn't go outside the direct examination. The direct examination was that the man made one statement and then he changed it and made another statement.

MS. FOWLER: Your Honor, he asked specifically whether, when he was making statements that were not true, what was his attitude. I think we are entitled to ask him, "Why did he tell you he did that."

THE COURT: Let me ask you this. Is your objection based on the fact she should have brought that up on direct?

[Tr. 243] MR. SILVER: Certainly.

THE COURT: I mean—

MR. SILVER: I stayed—

MS. FOWLER: Judge, I don't think I could have brought it up on direct.

MR. SILVER: Then you can't do it now, because I haven't gone outside the direct.

THE COURT: I think you probably could have brought it up on direct. I can't see why not. You have two statements there, you have a position, you have this position and then later it's 180 degrees changed. Why, did he tell you why he told you? I think that that is relevant. I mean, I think that's admissible testimony, as to why he—have you got anything else you want to say?

MR. SILVER: No, sir.

MS. FOWLER: No.

THE COURT: I'm going to allow it.

(Bench Conference Concluded).

REDIRECT EXAMINATION

BY MS. FOWLER:

Q Agent Walton, you had two conversations with Reginald Bernard Harris, is that right?

A Yes, ma'am.

Q The first one was on the telephone?

A A telephone conversation while he was at Dooly County [Tr. 244] and I was in my office.

Q The second one was—

A Here at the Marshal's Service office downstairs.

Q All right. In the first one, a telephone call, what, if anything, did he say to you about Fredel Williamson?

A He stated that the cocaine had been, the acquisition for the 19 kilograms had been—

MR. SILVER: If your honor please, I object to that. That question has been previously asked and previously answered.

MS. FOWLER: Your Honor, there is some confusion about the two separate conversations and we think we are entitled to straighten that out based on Mr. Silver's cross examination.

THE COURT: Well, I think what you, that you wanted to inquire as to, as to a particular matter. I think you can ask a question that is specifically addressed to this particular matter concerning why he changed it, why he said one thing one time and another and another, another final. Just address the question directly to that. I don't want to wander all over the landscape of what was said. I think the objection is good.

BY MS. FOWLER:

Q In the telephone conversation, without telling us what, the first time you talked to him, did he refer to [Tr. 245] Fredel Williamson?

A Yes, ma'am, he did.

Q All right. Now let's go to the in person second conversation, the second conversation which was an in

person conversation. He told you a story about a Cuban, is that correct?

A Yes, ma'am.

Q And what did he tell you about the Cuban and Fredel Williamson?

A He stated he had met this same Cuban subject in, or had seen him with Fredel Williamson in Atlanta and that he believed that he was an associate of Fredel Williamson's.

THE COURT: Wait a minute. I think, that has already been testified to.

MR. SILVER: Correct.

THE COURT: You want to know why, it seems to me, the question on redirect, as I understood, was if Mr. Harris gave any reason for changing his story. I don't want to go through all this previous testimony.

MS. FOWLER: Yes, sir.

BY MS. FOWLER:

Q Agent Walton, you said that he told, that he changed his story. Is that correct?

A Yes, ma'am.

Q Okay. Did he offer you an explanation for why he had [Tr. 246] lied?

A Yes, ma'am.

Q In his own words, did he tell you something?

A Yes, ma'am.

Q That is what we want you to tell us.

A He said that he had lied about the story regarding the Cuban and the cocaine having been placed in the trunk and the note attached and the telephone call from the pay phone because he was afraid and was scared, for himself and his family, of Fredel Williamson.

MS. FOWLER: One moment, Your Honor.

THE COURT: Any recross?

MS. FOWLER: One moment, Your Honor.

THE COURT: Okay.

MS. FOWLER: That's all we have, Your Honor.
THE COURT: Recross?

RECROSS EXAMINATION

BY MR. SILVER:

Q Did Mr. Harris cite to you any reasons why he would be afraid of Mr. Williamson?

A He stated—I'm not sure I understood your question. He did state to me the reason that he was afraid or scared.

Q Did he give you a reason that Mr. Williamson was a violent man?

A He gave me a reason why he was scared.
[Tr. 247] Q Yes, sir, but did he tell you that Mr. Williamson was a violent man?

A In those words?

Q Yes, sir.

A No, sir.

Q All right, sir. Now, this young fellow, at the time he made this statement to you, he was in your custody, was he not?

A Yes, sir, he was.

Q And he was downstairs in this courthouse in the lock-up in the Marshal's office?

A He was in an office, yes, sir.

Q And he had the United States Marshal's force downstairs controlling that office, did he not?

A The office that we were in?

Q Yes, sir.

A No, sir, there was no one else in the office but Mr. Harris and myself.

Q And is that office normally under the control of marshals?

A It's in their work space downstairs, yes, sir.

Q And being in that area, could he have been subjected to any violence by anybody?

A I don't see how it would be possible.

MR. SILVER: Thank you, sir. I have no other [Tr. 248] questions.

MS. FOWLER: I have one on account of his, Your Honor.

FURTHER REDIRECT EXAMINATION

BY MS. FOWLER:

Q Why did he tell you he was scared of Fredel Williamson?

MR. SILVER: Your Honor, previously asked and answered.

MS. FOWLER: Your Honor, Mr. Silver went into it. I couldn't have gone into it unless he opened the door.

(Bench conference).

THE COURT: Tell me why.

MS. FOWLER: Because he said he was afraid Fredel Williamson would kill him.

MR. SILVER: He has already said that. He already said what his purposes were.

MS. FOWLER: We couldn't have asked that, and Mr. Silver did, and made it restricted as to the word violent, and we feel like he opened the door as to why.

MR. SILVER: He has already given his reason. He stated it on your direct examination.

THE COURT: He said, it was apparent he wanted to testify more but was afraid to, he was afraid of the Court's ruling, not afraid of anything I was going to do to him, but [Tr. 249] he was wondering. I'm going to allow the question. I think you opened it up enough, but that is as far as it's going.

MS. FOWLER: Yes, sir.

MR. SILVER: Judge, how did I open it up? I asked the question whether or not the man made any statement that Mr. Williamson was violent. How did that open it up to let her now go back and ask another question?

MS. FOWLER: Your Honor, he said, he asked him did he say why he was scared.

MR. SILVER: He gave his reason on his direct examination, Judge, that the man feared for himself and his family.

MS. FOWLER: No.

MR. SILVER: Read it back.

MS. FOWLER: The witness has yet to say that.

MR. SILVER: Read it back.

(The referred to question and answer were read).

MS. FOWLER: He said he was scared of Fredel Williamson, and I respectfully disagree. Mr. Silver just then said, did he say why he was scared, and we think that opens the door for the witness to answer it.

THE COURT: I don't want to prejudice this man's rights, but I think if he had asked, in answer to your question, when he asked is he violent, if he knew he was a violent man, he hesitated and then he said, "Not in those [Tr. 250] words." And then you, I think he could have easily said, "Not in those words, but may I explain?" And I would have said yes, and then he could have said, "He told me—" what is it you think he is going to say?

MS. FOWLER: He told him he was afraid he would kill him and his mother, and his mother was not there protected by the marshal.

THE COURT: All right. This brings up another question. What is that based on, just a—a threat, maybe?

MS. FOWLER: I don't know whether Fredel had previously threatened him or not.

THE COURT: I'm going to amend it. If he had told him, had made a definite threat, then that is one thing. But just a fear that he would kill him—

MS. FOWLER: But, Judge, I couldn't ask it and Mr. Silver opened it up, "Did he say why?" All he could say was, he said he was scared, and Mr. Silver says why, and I think we are entitled to expand.

MR. SILVER: I didn't say why.

MS. FOWLER: Yes, sir.

MR. SILVER: I asked him did he, did Mr. Harris state that Mr. Williamson was a violent man, and he said no.

THE COURT: All right. This is important enough to where it brings a new element into the case and I'm going to send the jury out for a moment and hear what he did tell him [Tr. 251] and then I will rule.

(Bench Conference Concluded).

THE COURT: Ladies and Gentlemen, you know the way to the jury room, I'm sure.

JUROR: Yes.

(Jury excused from the courtroom).

THE COURT: All right, ask the question.

BY MS. FOWLER:

Q Agent Walton, did Reginald Bernard Harris tell you why he was afraid of Fredel Williamson?

A He stated that he was afraid that Fredel Williamson would kill him or his mother if he found out that he was telling the truth about the cocaine.

Q And did he state that he lived with his mother?

A Yes, ma'am, and that Mr. Williamson knew where they lived.

MS. FOWLER: That would be what we—

THE COURT: Mr. Silver, you may cross examine. I will rule after I hear both the direct and the cross.

BY MR. SILVER:

Q Mr. Walton, did Mr. Harris state to you that he had been threatened by Fredel Williamson?

A No, sir.

Q Now secondly, did Mr. Harris state to you that he was living with his mother?

[Tr. 252] A That is what he told me, yes, sir.

Q Did he not tell you that his mother was living in Ohio with her husband?

A No, sir.

Q He didn't tell you that?

A He told me she was visiting Ohio.

Q He didn't tell you that his mother's telephone number is in Ohio with her new husband Louis Brinkley, he didn't tell you that?

A Living there?

Q Yes.

A No, sir, said she was visiting Ohio and her new husband there, that he resided with his mother in the Atlanta area and they had two separate phone numbers at that house where the two of them resided.

THE COURT: Is there anything further? I want to limit it to this threat.

MR. SILVER: He has testified, Judge, there was no threat.

THE COURT: All right. The ruling is that I'm going to let in this same testimony. In other words, Mrs. Fowler can ask the question she asked and you can ask what you asked, and then we are going to leave it. I'm not going to, I'm going to let the jury decide what—let me ask this question. Did he give you any basis for the fear of his [Tr. 253] life?

THE WITNESS: In a general sense of conversation between the two of us, he said he knew the capabilities of Fredel Williamson with respect to the fact he had stated he was afraid he would be killed by Mr. Williamson.

THE COURT: Did he go further than that?

THE WITNESS: No, sir.

MR. SILVER: Judge, I would like to request the Court to read back what his response was on the direct examination when he stated what his reasons were in direct examination. He stated what his reasons were on the direct examination.

THE COURT: Here is the ruling of the Court. I'm going to let in the same testimony that was elicited by Mrs. Fowler and yourself, on this, just in the last few minutes. I'm not going to let you expand on that. The question was asked, Mrs. Fowler sat down, you asked some questions, you sat down. I feel like that with the questions that were asked, that it is at least, at least the jury has some information that is not—I don't want to get into speculation, that is the ruling of the Court. Now, can you recall exactly what you asked?

MR. SILVER: Judge, I would like to object to that on the grounds that this is an effort by the United States Attorney's Office to rehabilitate her own witness. The [Tr. 254] question was previously asked, previously answered. The man gave his reasons why in his initial remarks, as to why he said that the man told him that he feared for himself and feared for his mother. Now, for her to go back and rehabilitate her witness—

THE COURT: You mean on direct?

MR. SILVER: Yes, sir.

THE COURT: Well, that's the ruling. I'm going to allow the question.

MS. FOWLER: Your Honor, so I don't step afoul of the Court's ruling, as I understand it, I may just say why did he tell you he was afraid, and he give the answer—

THE COURT: I don't want it elaborated on any more than he, I don't want him to get into the things that came out after the two of you all asked your questions. What you asked him and things like that.

MS. FOWLER: I understand.

THE COURT: Let's just, we will just say the jury was here, the jury heard that testimony, and we will move on, but the jury wasn't here, so we have to do it again so they can hear it. So bring the jury in and both you all ask the same questions, do not broaden it from what you asked.

(The Jury Returned to the Courtroom).

THE COURT: All right, Mrs. Fowler.

BY MS. FOWLER:

[Tr. 255] Q Agent Walton, did Reginald Bernard Harris tell you why he was afraid of Fredel Williamson?

A Yes, ma'm.

Q What did he tell you?

A He told me that, he provided me with the information regarding Mr. Williamson's involvement with the cocaine, that he was afraid that Mr. Williamson would kill him or his mother.

MS. FOWLER: I thank you, sir.

THE COURT: Mr. Silver.

FURTHER RECROSS EXAMINATION

BY MR. SILVER:

Q Mr. Walton, did Mr. Harris tell you that Mr. Williamson had threatened him?

A No, sir.

Q Did he tell you that Mr. Williamson had threatened his mother?

A No, sir.

Q Mr. Walton, were any portions of this interview with Reginald Harris recorded?

A No, sir.

Q Was any portion of this interview with Reginald Harris written down and subsequently signed by Reginald Harris?

A No, sir. I believe I took some notes but there was no signed statement, as I recall.

[Tr. 256] MR. SILVER: Thank you, Judge. I have no other questions.

THE COURT: You may go down, now.

(Witness excused).

* * * *

[Tr. 307] MR. SILVER: Judge, on behalf of Mr. Fredel Williamson, I would respectfully move the Court for a judgment of acquittal of each of the three counts of the indictment, and as grounds therefore, Judge, I don't know if I have to enumerate my grounds or not.

THE COURT: I will let you do whatever you feel like you ought to do.

MR. SILVER: All right, sir. As grounds therefore, Judge, I would say that the evidence is insufficient to sustain a conviction on each of the three counts, and would [Tr. 308] especially cite, Judge, the rule of evidence 403, wherein we have, we have objected throughout the trial; rule 404, the character evidence not being admissible to prove conduct; and the overruling of the previous motion for mistrial, and Judge, finally, the insufficiency of the existence of the conspiracy.

THE COURT: Well, I don't think I need to hear from the Government. I'm quite familiar with the evidence, because I had to rule on almost every bit of it. This was a very interesting case, it has more serious evidentiary questions than any I believe I have ever tried. But nevertheless, I feel confident that, that the rulings were correct and that there is enough evidence for the jury to find beyond a reasonable doubt that he was guilty of each and every count if they choose to do so.

Also as I said earlier, I feel like in all due respect to the 11th Circuit, some of the cases did not give me the guidance that I would like to have had, and I just have to read them in connection with other cases and decide this is what they really intend for district judges to do, and I have done it that way and we will just have to see. If there is a conviction, I'm sure there will be an appeal.

So I'm denying your motion.

MR. SILVER: Judge, one other matter that I had. Mrs. Fowler, excuse me. As I recall, during one of our side [Tr. 309] bar conferences the Court seemed to suggest that at an appropriate time I could renew my motion that we had previously made to exclude parts of the testi-

mony as related by Agent Walton, with reference to Reginald Harris. And I'm still concerned about that, Judge. I know, I understand Your Honor's ruling, wherein Your Honor said that he could testify to things that existed during the pendency of the conspiracy. The point that I am concerned about is—

THE COURT: What he said, the phone call—

MR. SILVER: What he said about why he was afraid and that he was in fear, whatever the words were he used. It seems as though to me that was after the conspiracy and that was an observation on his part, not a restatement of anything that happened during the conspiracy.

THE COURT: Do you want to address that?

MS. FOWLER: No, Your Honor, the Court has already ruled.

THE COURT: I feel like that under the circumstances, I allowed that on redirect, I feel like that in your cross examination, that you might have brought out enough, or I feel like more than might, that you did bring out enough that would give the Government an opportunity to explain it. Now, quite frankly, I would have done that—strike that. It is not based upon just what you brought out on cross. I would have allowed the Government to do that on [Tr. 310] direct. If the Government said, "Did he tell you why he was changing his story on direct," I would have probably let him say because he was afraid, "I was afraid he would kill me."

You know, I think it balanced out pretty well. There is no, as far as, as far as the evidence is concerned, there is no evidence he ever made a threat against him, there is no evidence, it could be speculation on Harris' part that he was afraid that because this guy was doing drugs, that he would kill him, and so I mean, you know, so I don't think—anyway, I'm going to leave it alone.

MR. SILVER: All right.

THE COURT: But your point is preserved.

MR. SILVER: Thank you.

* * * *

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF GEORGIA

Case Number CR 89-37-MAC-DF

UNITED STATES OF AMERICA

v.

FREDEL WILLIAMSON

JUDGMENT INCLUDING SENTENCE
UNDER THE SENTENCING REFORM ACT

THE DEFENDANT:

- ☐ pleaded guilty to count(s) _____.
- ☒ was found guilty on count(s) One, Two, and Three after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Count Number(s)
21:846 icw 21:841(a)(1)	Conspiracy to possess with intent to distribute and to distribute cocaine, a Schedule II controlled substance	One
21:841(a)(1) 18:2	Aiding and abetting to possess with intent to distribute cocaine, a Schedule II controlled substance	Two
18:1952 & 2	Travel in interstate commerce to promote and carry on unlawful drug business enterprise	Three

The defendant is sentenced as provided in pages 2 through 5 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

- ☐ The defendant has been found not guilty on count(s) _____, and is discharged as to such count(s).

- ☐ Count(s) _____ (is) (are) dismissed on the motion of the United States.
- ☐ The mandatory special assessment is included in the portion of this Judgment that imposes a fine.
- ☒ It is ordered that the defendant shall pay to the United States a special assessment of \$150.00, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's Soc. Sec. Number :
265-47-7028

Defendant's residence address :
5161 Hidden Hill Trace
Stone Mountain, GA 30058

November 8, 1989
Date of Imposition of
Sentence

/s/ Duross Fitzpatrick
Signature of Judicial
Officer

DUROSS FITZPATRICK
U.S. District Court Judge
Name & Title of Judicial
Officer

November 15, 1989
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 327 months on Count One, 327 months on Count Two, and 60 months on Count Three to run concurrently for a total period of 327 months.

- ☐ The Court makes the following recommendations to the Bureau of Prisons:
- ☒ The defendant is remanded to the custody of the United States Marshal.
- ☐ The defendant shall surrender to the United States Marshal for this district.

a.m.

☐ at — p.m. on _____.

☐ as notified by the Marshal.

- ☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons
- ☐ before 2 p.m. on _____.
- ☐ as notified by the United States Marshal.
- ☐ as notified by the Probation Office.

RETURN

I have executed this Judgment as follows:

Defendant delivered on _____ to _____ at, _____, with a certified copy of this Judgment.

United States Marshal

By _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of Five Years.

While on supervised release, the defendant shall not commit another Federal, state, or local crime and shall comply with the standard conditions that have been adopted by this court (set forth on the following page). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

- ☐ The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.
- (1) Defendant shall not possess any firearms or other dangerous weapons.
- (2) Defendant shall not possess illegal controlled substances. Possession will result in mandatory revocation.
- (3) Defendant shall not violate any other federal, state or local laws.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on probation or supervised release pursuant to this Judgment:

- 1) The defendant shall not commit another Federal, state or local crime;
- 2) the defendant shall not leave the judicial district without the permission of the court or probation officer;
- 3) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
- 4) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 5) the defendant shall support his or her dependents and meet other family responsibilities;
- 6) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
- 7) the defendant shall notify the probation officer within seventy-two hours of any change in residence or employment;
- 8) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;
- 9) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 10) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate

with any person convicted of a felony unless granted permission to do so by the probation officer;

- 11) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
- 12) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 13) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
- 14) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

These conditions are in addition to any other conditions imposed by this Judgment.

FINE WITH SPECIAL ASSESSMENT

The defendant shall pay to the United States the sum of \$150.00, consisting of a fine of \$0 and a special assessment of \$150.00.

- ☒ These amounts are the totals of the fines and assessments imposed on individual counts, as follows:

\$50.00 mandatory assessment on Count One.
 \$50.00 mandatory assessment on Count Two.
 \$50.00 mandatory assessment on Count Three.

This sum shall be paid ☒ immediately.
☐ as follows:

- ☐ The Court has determined that the defendant does not have the ability to pay interest. It is ordered that:
- ☐ The interest requirement is waived.
 - ☐ The interest requirement is modified as follows:

It is the Court's judgment that the defendant is unable and not likely to become able to pay all or part of a fine even with the use of a reasonable installment schedule; therefore, the Court waives the fine as well as any alternative sanctions in this case. The Court is also waiving the additional fine requiring that defendant pay the cost of imprisonment and/or supervision fee.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 89-8938

Non-Argument Calendar

D.C. Docket No. CR-89-37

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

FREDEL WILLIAMSON, a/k/a "FRED",
Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Georgia

(December 23, 1992)

Before TJOFLAT, Chief Judge, HATCHETT and AN-
DERSON, Circuit Judges.

PER CURIAM:

Affirmed: See Circuit Rule 36-1.

Judgment Entered: December 23, 1992

For the Court: MIGUEL J. CORTEZ
Clerk

By: /s/ [Illegible]
Deputy Clerk

Issued as Mandate: Apr. 07, 1993

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 89-8938

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

FREDEL WILLIAMSON, a/k/a "FRED",
Defendant-Appellant.

On Appeal from the United States District Court
for the Middle District of Georgia

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC

Before: TJOFLAT, Chief Judge, HATCHETT and AN-
DERSON, Circuit Judges.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Joseph D. Hatchett
United States Circuit Judge

SUPREME COURT OF THE UNITED STATES

 No. 93-5256

 FREDEL WILLIAMSON,
Petitioner

v.

UNITED STATES

 ON PETITION FOR WRIT OF CERTIORARI TO THE
 UNITED STATES COURT OF APPEALS
 FOR THE ELEVENTH CIRCUIT

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

January 10, 1994

ORDER LIST

FRIDAY, JANUARY 21, 1994

ORDER IN PENDING CASE

93-5256 WILLIAMSON, FREDEL v. UNITED STATES

In lieu of the first question presented by the petition for a writ of certiorari, the parties are directed to brief and argue, in addition to Questions 2 and 3, the following question: Whether a post-arrest confession by an accomplice implicating a defendant, offered as an admission against penal interest of an unavailable declarant under Federal Rule of Evidence 804(b)(3), bears adequate indicia of reliability to render it admissible under Rule 804(b)(3) and the Sixth Amendment Confrontation Clause?

MAR 4 1994

OFFICE OF THE CLERK

No. 93-5256

In The
Supreme Court of the United States
October Term, 1993

FREDEL WILLIAMSON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Eleventh Circuit**

BRIEF FOR PETITIONER

BENJAMIN S. WAXMAN
ROBBINS, TUNKEY, ROSS, AMSEL
& RABEN, P.A.
2250 Southwest Third Avenue
Miami, Florida 33129
(305) 858-9550
Counsel for Petitioner

56177

QUESTIONS PRESENTED

I. Whether a post-arrest confession by an accomplice implicating a defendant, offered as an admission against penal interest of an unavailable declarant under Federal Rule of Evidence 804(b)(3), bears adequate indicia of reliability to render it admissible under Rule 804(b)(3) and the Sixth Amendment Confrontation Clause?

II. Whether a post-arrest confession by an accomplice implicating a defendant, offered as an admission against penal interest of an unavailable declarant under Federal Rule of Evidence 804(b)(3), constitutes a firmly rooted hearsay exception rendering it presumptively reliable and not subject to further analysis under the Sixth Amendment Confrontation Clause?

III. Whether 804(b)(3)'s requirement that a statement must be corroborated by circumstances clearly indicating its trustworthiness, is subject to the further requirement of *Idaho v. Wright*, 497 U.S. 805 (1990), that the only circumstances that can be considered are those surrounding the making of the statement?

TABLE OF CONTENTS

	Page(s)
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISION AND RULES INVOLVED	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	6
ARGUMENT	11
I. THE ADMISSION OF HARRIS'S POST-ARREST HEARSAY STATEMENTS VIOLATED WILLIAMSON'S SIXTH AMENDMENT RIGHT TO CONFRONT HIS ACCUSER	11
A. A POST-ARREST STATEMENT OF A NON-TESTIFYING ALLEGED ACCOMPLICE WHICH INCRIMINATES THE DECLARANT AND A CRIMINAL DEFENDANT DOES NOT CONSTITUTE A FIRMLY ROOTED HEARSAY EXCEPTION	14
B. HARRIS'S POST-ARREST STATEMENTS IMPLICATING WILLIAMSON DID NOT BEAR ADEQUATE INDICIA OF RELIABILITY TO RENDER THEM ADMISSIBLE UNDER THE CONFRONTATION CLAUSE	22

TABLE OF CONTENTS - Continued

	Page(s)
C. A POST-ARREST STATEMENT OF A NON-TESTIFYING ALLEGED ACCOMPLICE WHICH INCRIMINATES THE DECLARANT AND A CRIMINAL DEFENDANT AND WAS ELICITED THROUGH CUSTODIAL INTERROGATION IS INHERENTLY UNRELIABLE. ITS INTRODUCTION AT THE DEFENDANT'S SEPARATE TRIAL NECESSARILY VIOLATES THE CONFRONTATION CLAUSE	30
II. HARRIS'S POST-ARREST STATEMENTS INCULPATING WILLIAMSON WERE INADMISSIBLE AS STATEMENTS AGAINST INTEREST UNDER FEDERAL RULE OF EVIDENCE 804(b)(3)	34
A. TO SECURE ADMISSION OF STATEMENTS IMPLICATING THE DECLARANT AND THE ACCUSED IN A CRIMINAL CASE, THE GOVERNMENT MUST ESTABLISH CORROBORATING CIRCUMSTANCES CLEARLY INDICATING THE TRUSTWORTHINESS OF THE STATEMENTS	35
B. HARRIS'S POST-ARREST STATEMENTS IMPLICATING WILLIAMSON WERE INADMISSIBLE BECAUSE THEY WERE NOT AGAINST HARRIS'S PENAL INTEREST	38
C. HARRIS'S POST-ARREST STATEMENTS IMPLICATING WILLIAMSON WERE INADMISSIBLE BECAUSE THE GOVERNMENT FAILED TO ESTABLISH CORROBORATING CIRCUMSTANCES CLEARLY INDICATING THEIR TRUSTWORTHINESS	45
CONCLUSION	46

TABLE OF AUTHORITIES

Page(s)

CASES

<i>Bourjaily v. United States</i> , 483 U.S. 171 (1987)	15
<i>Bruton v. United States</i> , 391 U.S. 123 (1968)	<i>passim</i>
<i>California v. Green</i> , 399 U.S. 149 (1970)	12, 36
<i>Chambers v. Mississippi</i> , 410 U.S. 284 (1973)	15, 17, 24, 25, 29, 38
<i>Cruz v. New York</i> , 481 U.S. 186 (1987)	31
<i>Davis v. Alaska</i> , 415 U.S. 308 (1974)	12
<i>Donnelly v. United States</i> , 228 U.S. 243 (1913)	17
<i>Douglas v. Alabama</i> , 380 U.S. 415 (1965)	15, 22, 31
<i>Dutton v. Evans</i> , 400 U.S. 74 (1970)	24, 25, 36
<i>Florida v. Wells</i> , 495 U.S. 1 (1991)	30
<i>Fuson v. Jago</i> , 773 F.2d 55 (6th Cir. 1985)	19, 43
<i>Idaho v. Wright</i> , 497 U.S. 805 (1990)	<i>passim</i>
<i>Jennings v. Maynard</i> , 946 F.2d 1502 (10th Cir. 1991)	20, 21
<i>Latine v. Mann</i> , 830 F.Supp. 774 (S.D.N.Y. 1993)	20, 22
<i>Lee v. Illinois</i> , 476 U.S. 530 (1986)	<i>passim</i>
<i>Mattox v. United States</i> , 156 U.S. 237 (1895)	14
<i>Miranda v. Arizona</i> , 384 U.S. 436 (1966)	32
<i>Morrison v. Duckworth</i> , 929 F.2d 1180 (7th Cir. 1991)	21
<i>New Mexico v. Earnest</i> , 477 U.S. 648 (1986)	31
<i>Ohio v. Roberts</i> , 448 U.S. 56 (1980)	<i>passim</i>

TABLE OF AUTHORITIES – Continued

Page(s)

<i>Olson v. Green</i> , 668 F.2d 421 (8th Cir.), <i>cert. denied</i> , 456 U.S. 1009 (1982)	22
<i>Parker v. Randolph</i> , 442 U.S. 62 (1979)	31
<i>People v. Leach</i> , 15 Cal.3d 419, 124 Cal.Rptr. 752, 541 P.2d 296 (1975), <i>cert. denied</i> , 424 U.S. 916 (1976)	20
<i>People v. Nally</i> , 134 Ill.App.3d 865, 480 N.W.2d 1373 (1985)	20
<i>Pointer v. Texas</i> , 380 U.S. 400 (1965)	12
<i>Richardson v. Marsh</i> , 481 U.S. 200 (1987)	31
<i>State v. Abourezk</i> , 359 N.W.2d 137 (S.D. 1984)	20
<i>State v. Hansen</i> , 312 N.W.2d 96 (Minn. 1981)	20
<i>State v. Hughes</i> , 244 Neb. 810 (1993)	20
<i>State v. St. Pierre</i> , 759 P.2d 383 (Wash. 1988)	20
<i>Sussex Peerage Case</i> , 11 Cl. & F.85, 8 Eng.Rep. 1034 (1844)	17
<i>United States v. Alvarez</i> , 584 F.2d 694 (5th Cir. 1978)	19, 36, 37, 38
<i>United States v. Bailey</i> , 581 F.2d 341 (3d Cir. 1978)	25
<i>United States v. Bakhtiar</i> , 994 F.2d 970 (2d Cir. 1993)	20, 21
<i>United States v. Boyce</i> , 849 F.2d 833 (3d Cir. 1988)	19, 24, 27
<i>United States v. Brainard</i> , 690 F.2d 1117 (4th Cir. 1982)	38
<i>United States v. Cuthel</i> , 903 F.2d 1381 (11th Cir. 1990)	27
<i>United States v. Flores</i> , 985 F.2d 770 (5th Cir. 1993)	<i>passim</i>

TABLE OF AUTHORITIES – Continued

	Page(s)
<i>United States v. Garcia</i> , 897 F.2d 1413 (7th Cir. 1990)	38
<i>United States v. Gomez-Lemos</i> , 939 F.2d 326 (6th Cir. 1991)	19
<i>United States v. Harrell</i> , 788 F.2d 1524 (11th Cir. 1986)	28, 29
<i>United States v. Harty</i> , 930 F.2d 1257 (7th Cir. 1991)	38
<i>United States v. Inadi</i> , 475 U.S. 387 (1986)	14
<i>United States v. Innamorati</i> , 996 F.2d 456 (1st Cir. 1993)	21
<i>United States v. Johnson</i> , 802 F.2d 1459 (D.C. Cir. 1986)	19
<i>United States v. Katsougrakis</i> , 715 F.2d 769 (2d Cir. 1983), <i>cert. denied</i> , 464 U.S. 1040 (1984)	20, 37
<i>United States v. Lilley</i> , 581 F.2d 182 (8th Cir. 1978)	19, 43
<i>United States v. Love</i> , 592 F.2d 1022 (8th Cir. 1979)	25, 27, 43
<i>United States v. Magna-Olvera</i> , 917 F.2d 401 (9th Cir. 1990)	18, 24, 41
<i>United States v. Oliver</i> , 626 F.2d 254 (2d Cir. 1981)	25, 27, 28, 38
<i>United States v. Palumbo</i> , 639 F.2d 123 (3d Cir.), <i>cert. denied</i> , 454 U.S. 819 (1981)	<i>passim</i>
<i>United States v. Riley</i> , 657 F.2d 1377 (8th Cir. 1981), <i>cert. denied</i> , 459 U.S. 111 (1983)	19, 24, 27, 38, 42
<i>United States v. Robinson</i> , 635 F.2d 363 (5th Cir. Unit B), <i>cert. denied</i> , 452 U.S. 916 (1981)	27, 28, 29
<i>United States v. Sarmiento-Perez</i> , 633 F.2d 1092 (5th Cir. Unit A 1981), <i>cert. denied</i> , 459 U.S. 834 (1982)	<i>passim</i>

TABLE OF AUTHORITIES – Continued

	Page(s)
<i>United States v. Seeley</i> , 892 F.2d 1 (1st Cir. 1989)	20, 37
<i>United States v. Sokolow</i> , 490 U.S. 1 (1989)	30
<i>United States v. Taggart</i> , 944 F.2d 837 (11th Cir. 1991)	20, 21, 38
<i>United States v. Vernor</i> , 902 F.2d 1182 (5th Cir.), <i>cert. denied</i> , 111 S.Ct. 301 (1990)	19, 22
<i>United States v. Williams</i> , 989 F.2d 1061 (9th Cir. 1993)	38
<i>United States v. York</i> , 933 F.2d 1343 (7th Cir.), <i>cert. denied</i> , 112 S.Ct. 321 (1991)	20, 21, 36, 37
<i>White v. Illinois</i> , ___ U.S. ___, 112 S.Ct. 736 (1992)	14, 15, 25, 36
<i>Withrow v. Williams</i> , ___ U.S. ___, 113 S.Ct. 1745 (1993)	32
STATUTES, RULES, AND CONSTITUTIONAL PROVISIONS	
Arkansas Statute § 28-1001	19
Federal Rules of Evidence	
Rule 801(c)	1, 34
Rule 802	2, 34, 43
Rule 804(b)	34
Rule 804(b)(3)	<i>passim</i>
Florida Statute § 90.804(2)(C) (1990)	19
Maine Rule of Evidence 804(b)(3) (1993)	19
Nevada Revised Statute Title 4 § 51.345	19
North Dakota Rule of Evidence 804(b)(3)	19
Uniform Rule of Evidence 804(b)(3)	19

TABLE OF AUTHORITIES – Continued

	Page(s)
United States Constitution	
Fourth Amendment.....	30
Fifth Amendment.....	3
Sixth Amendment	<i>passim</i>
United States Code Title 28, Section 1254(1).....	1
Vermont Rule of Evidence 804(b)(3).....	19
OTHER AUTHORITIES	
E. CLEARY, MCCORMICK ON EVIDENCE § 279 (2d ed. 1972).....	39
E. CLEARY, MCCORMICK ON EVIDENCE (3d ed. 1984)	
§ 278.....	17
§ 279.....	40
H.R.REP.NO. 650, 93d Cong., 2d Sess. (1974), <i>reprinted in 1974 U.S. CODE CONG. & ADMIN.</i> NEWS.....	18, 32, 35
Notes of Advisory Committee on 1972 Proposed Rules, West's Federal Criminal Code and Rules (1993).....	25
Notes of Conference Committee, H.REP.NO. 93-1597, WEST'S FEDERAL CRIMINAL CODE AND RULES (1993).....	36
4 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE (1993)	
¶ 804(b)(3)[02].....	39
¶ 804(b)(3)[03].....	18, 20, 32, 36, 40

TABLE OF AUTHORITIES – Continued

	Page(s)
5 J. WIGMORE, EVIDENCE § 1395 (3d ed. 1940).....	12
5 J. WIGMORE, EVIDENCE § 1476 (Chadbourn rev. 1974).....	17
S.REP.NO. 1277, 93d Cong., 2d Sess. (1974), <i>reprinted in 1974 U.S. CODE CONG. & ADMIN.</i> NEWS.....	18, 32, 36

OPINION BELOW

The judgment of the United States Court of Appeals, Eleventh Circuit, is unpublished. J.A. 78. The evidentiary rulings by the district court, which the court of appeals affirmed, are also unpublished. J.A. 31-32, 35-36, 51-52.

JURISDICTION

The judgment under review was entered on December 23, 1992. J.A. 78. The Petitioner's Suggestion of Rehearing *En Banc* was denied on March 24, 1993. J.A. 79. On June 16, 1993, this Court granted Petitioner's Application for Extension of Time to File Petition for Writ of Certiorari to July 15, 1993. The Petition was timely filed and certiorari was granted on January 10, 1994. J.A. 80. Jurisdiction is invoked under 28 U.S.C. section 1254(1).

CONSTITUTIONAL PROVISION AND RULES INVOLVED

Confrontation Clause of the Sixth Amendment to the United States Constitution:

In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . .

Federal Rule of Evidence 801(c):

Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at

the trial or hearing, offered in evidence to prove the truth of the matter asserted.

Federal Rule of Evidence 802:

Hearsay Rule. Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

Federal Rule of Evidence 804(b)(3):

- (b) **Hearsay exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
- (3) **Statement against interest.** A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

STATEMENT OF THE CASE

Fredel Williamson and Reginald Harris were charged in the Middle District of Georgia with conspiring to possess with intent to distribute cocaine, possession with intent to distribute cocaine, and interstate travel for the

purpose of promoting and carrying on the unlawful activity of distributing cocaine. J.A. 4-6. Harris had been stopped by a Georgia deputy sheriff after his vehicle veered off an interstate highway. Tr.80-83. He consented to a search of the vehicle, which resulted in the discovery of 19 kilograms of cocaine in two suitcases in the trunk. Tr.89-90, 93-95, 228. Harris was arrested, interrogated twice over the next several hours, and made various statements implicating himself and Williamson. J.A. 20-30, 33, 36-41, 43-44; Tr.94.

Prior to trial, the government moved to sever the defendants, recognizing that introduction of Harris's post-arrest statements would incriminate Williamson. J.A. 7; R.27. The government acknowledged that the introduction of Harris's statements would violate Williamson's Sixth Amendment rights. J.A. 7; R.27. The district judge granted the government's motion to sever. J.A. 7-8.

At Williamson's trial, the government called Harris as a witness. J.A. 9. Harris immediately invoked his Fifth Amendment privilege. J.A. 9. When he persisted in his refusal to testify after being granted immunity, the court held Harris in contempt. J.A. 14; R.50, 51, 52. Contrary to the position it had taken in requesting severance, the government then introduced Harris's post-arrest statements through DEA agent Walton. J.A. 15, 20-31, 33-34, 36-44. Williamson interposed timely hearsay and confrontation clause objections. J.A. 16-19, 34-36, 69-70. The district judge overruled all objections and related motions for mistrial. J.A. 31-32, 35-36, 51-52, 69-70.

The testimony established that after being in custody for approximately one hour and being advised that any

cooperation he provided would be relayed to the prosecuting attorney, Harris was interrogated telephonically by DEA agent Walton. J.A. 25-27, 33, 36, 52-53. The agent testified that during this interrogation, Harris told him that the cocaine seized from his vehicle was acquired by Williamson, that it belonged to Williamson, and that he (Harris) was supposed to drop it in a dumpster later that night in Atlanta. J.A. 37. Harris asked whether this conversation was being tape recorded. J.A. 25.

Harris was interrogated a second time by the agent, this time in person, after being in custody for approximately six and one-half hours. J.A. 22, 38, 43. Harris was again told that any cooperation he provided would be documented and relayed to the prosecutor. J.A. 26. The agent testified that this time Harris stated he had rented his automobile several days before and had driven it to Ft. Lauderdale, Florida, to meet Williamson. J.A. 38. Harris told him he acquired the cocaine in Ft. Lauderdale from a Cuban acquaintance of Williamson who placed the cocaine in the trunk and left written instructions on how to deliver it. J.A. 39.

When the agent pressed Harris to assist with a controlled delivery, Harris stated he had lied about the delivery to the trash dumpster, the pick-up from the Cuban, and the note regarding the delivery instructions. J.A. 39-40, 56. The agent testified that Harris now stated he was delivering the cocaine to Williamson in Atlanta, but that any controlled delivery would be impossible because Williamson had been travelling in front of him at the time of his arrest and would have observed the entire event. J.A. 40-41. Harris refused to provide any written statement. J.A. 24. Upon the conclusion of this interrogation,

Harris requested the assistance of an attorney. J.A. 24, 29-30.

The district court addressed Mr. Williamson's objections to admission of Harris's hearsay statements on at least three separate occasions. The court initially found the statements admissible reasoning that because the statements were voluntary, they necessarily were trustworthy and, thus, admissible under Rule 804(b)(3), and not contrary to Williamson's confrontation rights. J.A. 31. Addressing the issue a second time, the court confirmed its prior ruling, this time reasoning Harris's statements were admissible as co-conspirator hearsay statements. J.A. 35-36. Finally, the court ruled, specifically under Rule 804(b)(3), that the statements were admissible because Harris had implicated himself, was unavailable, and there existed "sufficient corroborating circumstances" to insure the trustworthiness of the statements. J.A. 51-52.

Harris's post-arrest statements were clearly the most damaging evidence against Williamson. The government's other evidence mainly consisted of items seized from Harris's rental vehicle including a piece of luggage which bore initials corresponding with Williamson's sister's name, Gov.Ex.7, Tr.93, 256, an envelope addressed to Williamson found inside the glove compartment, Gov.Ex.11, Tr.101, a receipt in the name of Williamson's girlfriend also found in the glove compartment, Gov.Ex.17, Tr.107-08, and the automobile rental agreement which listed Williamson as an additional driver. Gov.Exs.3, 5, Tr.84, 153, 301-05. No fingerprints of Mr. Williamson were found in the vehicle or upon any of its contents. Tr.112. The government also introduced, over objection, the testimony of a narcotics trafficker awaiting

sentencing on two federal indictments exposing him to a life without parole sentence. Tr.274-75, 284-87. This witness claimed he had sold cocaine to Williamson on 5 to 10 occasions, in amounts ranging from 10 to 20 kilograms, ending approximately 18 months before the events underlying the charges in the instant case. Tr. 275-78, 297.

The jury found Mr. Williamson guilty on all three counts. J.A. 71. The district court adjudicated him guilty and sentenced him to 327 months imprisonment. J.A. 71-73. He is presently in custody serving this sentence. The United States Court of Appeals, Eleventh Circuit, affirmed Williamson's conviction without opinion, J.A. 78, and denied rehearing. J.A. 79.¹ On January 10, 1994, this court granted Williamson's Petition for Writ of Certiorari and Motion for Leave to Proceed *In Forma Pauperis*. J.A. 80.

SUMMARY OF ARGUMENT

IA. The admission of Harris's post-arrest hearsay statements violated Williamson's Sixth Amendment right to confront his accuser. To comport with a defendant's Confrontation Clause rights, in addition to demonstrating

¹ While the case was pending on appeal, the government secured a remand to the district court to address its claim that Mr. Williamson had waived his confrontation rights by procuring Harris's silence at trial. R.96. Following an evidentiary hearing, the district court concluded that Mr. Williamson had not waived his confrontation rights. It also found, ironically, that Harris was not a credible witness. Tr.Nov. 26 & 27, 1991; R.111.

the declarant's unavailability, the government must demonstrate that the hearsay bears adequate indicia of reliability. *Ohio v. Roberts*, 448 U.S. 56, 65-66 (1980). Reliability can be inferred where the evidence falls within a firmly rooted hearsay exception. Otherwise, the evidence must be excluded absent a showing of particularized guarantees of trustworthiness. *Id.*

The post-arrest statement of a non-testifying alleged accomplice which incriminates the declarant and a criminal defendant does not constitute a firmly rooted hearsay exception. The hearsay exception for statements against interest has long been recognized but was traditionally limited to pecuniary and proprietary interests. Expansion to include statements against penal interest is recent. Particularly where such statements are elicited through custodial interrogation, this Court has repeatedly emphasized their suspect nature and the grave threat they pose to the reliability of the factfinding process. See *Lee v. Illinois*, 476 U.S. 530 (1986).

Federal Rule of Evidence 804(b)(3), the exception for statements against interest, includes statements against penal interest. However, its legislative history reflects that statements against penal interest which implicate the declarant and an accused were intended to be excluded from this exception. Although the language expressly excluding such statements was ultimately deleted, many decisions of the federal courts of appeals continue to hold that these statements are inherently unreliable and do not pass muster under the Confrontation Clause. For all of these reasons, these statements do not constitute a firmly rooted exception.

IB. Harris's post-arrest statements implicating Williamson do not bear adequate indicia of reliability to render them admissible under the Confrontation Clause. This Court observed in *Lee* that the "truthfinding function of the Confrontation Clause is uniquely threatened when an accomplice's confession is sought to be introduced against a criminal defendant without the benefit of cross-examination." *Id.*, 476 U.S. at 54l. This is due to the accomplice's "strong motivation to implicate the defendant" in order "to shift or spread blame, curry favor, avenge himself, or divert attention to another. . . ." *Id.* "[W]hen one person accuses another of a crime under circumstances in which the declarant stands to gain by inculpating another, the accusation is presumptively suspect and must be subjected to the scrutiny of cross-examination." *Id.* at 45l.

The facts of the instant case confirmed the presumptive unreliability of Harris's hearsay statements. The statements were made in response to custodial interrogation. They were made after Harris was advised that the prosecutor would be advised of any cooperation. Harris's statements minimized his own involvement and ascribed the bulk of the blame to Williamson. The statements were inconsistent. The totality of the circumstances surrounding Harris's statements failed to establish their trustworthiness.

IC. This Court should fashion a bright-line test excluding from a criminal defendant's separate trial, all post-arrest custodial statements which jointly incriminate the declarant and the defendant. This Court has expressed its doubt about the trustworthiness of such statements in the strongest terms. In practice, it has never

sanctioned their admission into evidence. In the context of joint trials of a non-testifying declarant and an incriminated defendant, this Court has consistently assumed that such statements are inadmissible against the defendant. Establishing a bright-line test excluding hearsay statements within this narrow but common class would add invaluable safeguards to the truthfinding function of trials and contribute substantially to the efficient administration of justice.

IIA. Harris's post-arrest statements inculcating Williamson were inadmissible as statements against interest under Federal Rule of Evidence 804(b)(3). Besides this Rule's express requirement that a proponent demonstrate the unavailability of the declarant and that the statement was against the declarant's penal interest, the Rule's legislative history reflects an implicit requirement that post-arrest incriminatory statements of non-testifying declarants be supported by particularized guarantees of trustworthiness. The standard is similar to the one expressly employed by the Rule which requires similar statements offered to exculpate a defendant to be corroborated by circumstances clearly indicating their trustworthiness. In the interests of simplicity and uniformity, this Court should require the government to establish circumstances clearly indicating trustworthiness to secure admission of inculpatory hearsay statements, too.

IIB. Harris's post-arrest statements implicating Williamson were inadmissible because they were not against Harris's penal interest. The justification for admitting such hearsay is that a reasonable person in the declarant's position would not make a statement against interest

unless it were true. The Rule does not address the situation where a declaration contains both self-serving and disserving parts. This Court's decision in *Lee*, as well as respected scholarly opinion, indicates that all self-serving parts of such statements should be excluded.

The portions of Harris's post-arrest statements inculcating Mr. Williamson were self-serving. They minimized Harris's role while characterizing Williamson as a principal. The statements were made after Harris was advised that his cooperation would be relayed to the prosecutor. Thus, the portions of his statements implicating Williamson should have been excluded.

IIC. Harris's post-arrest statements implicating Williamson were inadmissible because the government failed to establish corroborating circumstances clearly indicating their trustworthiness. These circumstances, according to this Court's decision in *Idaho v. Wright*, 497 U.S. 805 (1990), are limited to those immediately surrounding the making of the statement. Thus, the same circumstances that failed to establish trustworthiness under the Confrontation Clause similarly fail to establish trustworthiness under Rule 804(b)(3).

ARGUMENT

I. THE ADMISSION OF HARRIS'S POST-ARREST HEARSAY STATEMENTS VIOLATED WILLIAMSON'S SIXTH AMENDMENT RIGHT TO CONFRONT HIS ACCUSER.

Williamson's conviction rests upon the post-arrest hearsay statements of an uncross-examined alleged accomplice who implicated him under circumstances which this Court has repeatedly held are highly suspect and render such statements presumptively unreliable. The two statements were made after one hour and six and one-half hours in custody, respectively. They were made in response to police interrogation and upon repeated assurances that any cooperation would be relayed to the prosecutor. The statements were consistent only inasmuch as they minimized the claimed accomplice's involvement as a drug courier and maximized Williamson's involvement as the purchaser, owner, and intended recipient of the cocaine. They were, otherwise, contradictory. The declarant refused to give a written statement and was concerned about his oral statement being tape recorded. He had every possible incentive to wrongfully blame Williamson. These circumstances confirmed the presumptive unreliability of the hearsay. Admitting these statements into evidence violated Williamson's constitutional confrontation rights and compromised his right to a fair trial.

The Sixth Amendment's Confrontation Clause guarantees the right of an accused in a criminal prosecution "to be confronted with the witnesses against him. The main essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination."

Davis v. Alaska, 415 U.S. 308, 315-16 (1974) (quoting 5 J. WIGMORE, EVIDENCE § 1395 at 123 (3d ed. 1940)). "There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in the expression of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of a fair trial which is this country's constitutional goal." *Pointer v. Texas*, 380 U.S. 400, 405 (1965).

The right to confront and cross-examine adverse witnesses serves symbolic and functional goals. First, the Confrontation Clause advances the perception of fairness by "ensuring that convictions will not be based on the charges of unseen and unknown – and hence unchallengeable – individuals." *Lee v. Illinois*, 476 U.S. 530, 540 (1986). Second, it promotes reliability in criminal trials. As this Court observed in *California v. Green*, 399 U.S. 149 (1970), confrontation

(1) insures that the witness will give his statements under oath – thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the "greatest legal engine ever invented for the discovery of truth"; [and] (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.

Id. at 158 (footnote omitted).

In *Ohio v. Roberts*, 448 U.S. 56 (1980), this Court set forth the general framework for determining when

incriminating statements, admissible under an exception to the hearsay rule, also satisfy the requirements of the Confrontation Clause. As this Court restated in *Idaho v. Wright*, 497 U.S. 805, 110 S.Ct. 3139 (1990):

"First, in conformance with the Framers' preference for face-to-face accusation, the Sixth Amendment establishes a rule of necessity. In the usual case . . . , the prosecution must either produce or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant." . . . Second, once a witness is shown to be unavailable, "his statement is admissible only if it bears adequate 'indicia of reliability.' Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness."

Id., 110 S.Ct. at 3146 (quoting *Roberts*, 448 U.S. at 65-66). With regard to this latter requirement, *Wright* clarified that in demonstrating the trustworthiness of such hearsay statements, a court may only consider those circumstances surrounding the making of the statement that rendered the declarant particularly worthy of belief, not the totality of circumstances that may have been proved at trial. *Id.* at 3148.

According to the foregoing analysis, there are two paradigms for analyzing the admissibility of hearsay statements for Confrontation Clause purposes. Under both, the Confrontation Clause generally requires the

proponent to show that the declarant is unavailable² and the statement bears adequate indicia of reliability. *Wright*, 110 S.Ct. at 3146. If the hearsay falls within a firmly rooted hearsay exception, reliability may be presumed. *Id.* If not, reliability must be shown from particularized guarantees of trustworthiness derived only from those circumstances surrounding the making of the statement and that render the declarant particularly worthy of belief. *Id.*

A. A POST-ARREST STATEMENT OF A NON-TESTIFYING ALLEGED ACCOMPLICE WHICH INCRIMINATES THE DECLARANT AND A CRIMINAL DEFENDANT DOES NOT CONSTITUTE A FIRMLY ROOTED HEARSAY EXCEPTION.

This Court uses the term "firmly rooted" to describe those hearsay exceptions which "rest upon such solid foundations that admission of virtually any evidence within them comports with the 'substance of constitutional protection.'" *Ohio v. Roberts*, 448 U.S. at 66 (quoting *Mattox v. United States*, 156 U.S. 237, 244 (1895)). Stated differently, firmly rooted hearsay exceptions describe categorical situations that provide substantial guarantees of trustworthiness. See *White v. Illinois*, ___ U.S. ___, 112 S.Ct. 736, 742 (1992). "Admission under a firmly rooted hearsay exception satisfies the constitutional requirement of reliability because of the weight

² This Court held in *United States v. Inadi*, 475 U.S. 387 (1986), that unavailability is not required when the hearsay statement is the out-of-court declaration of a co-conspirator.

accorded long-standing judicial and legislative experience in assessing the trustworthiness of certain types of out-of-court statements." *Idaho v. Wright*, 497 U.S. 805, ___, 110 S.Ct. 3139, 3147 (1990).

In determining whether a particular hearsay statement falls within a "firmly rooted exception," this Court has looked to, *inter alia*, the length of time the exception has been recognized, *White*, 112 S.Ct. at 742 n.8 (exception for spontaneous declarations at least two centuries old); *Bourjaily v. United States*, 483 U.S. 171, 183 (1987) (co-conspirator hearsay exception first established in Supreme Court over a century and a half ago); the breadth of its acceptance, *id.*, and whether all types of statements which fall within the exception bear the requisite indicia of reliability. See *Wright*, 110 S.Ct. at 3147 (residual hearsay exception not firmly rooted because it accommodates *ad hoc* situations in which hearsay statements made); *Lee*, 476 U.S. at 544 n.5 (categorization of statements as simple "declaration against penal interest" describes too large a class for meaningful confrontation clause analysis).

Statements against penal interest, such as the ones Harris made against Williamson, do not fall within a firmly rooted hearsay exception. This Court has repeatedly emphasized the suspect nature of these statements and the grave threat they present to the reliability of the fact-finding process. *E.g.*, *Lee*, 476 U.S. at 541, 544-45; *Bruton v. United States*, 391 U.S. 123, 136, 141-42 (1968); *Douglas v. Alabama*, 380 U.S. 415, 419 (1965); see *Chambers v. Mississippi*, 410 U.S. 284, 299-300 (1973). Indeed, in *Lee*, the majority decision summarily rejected Illinois's assertion that the statements at issue, parts of an accomplice's

confession which incriminated the defendant, bore sufficient indicia of reliability because they fell within a firmly rooted hearsay exception: "We reject respondent's categorization of the hearsay involved in this case as a simple 'declaration against penal interest.' That concept defines too large a class for meaningful Confrontation Clause analysis. We decide this case as involving a confession by an accomplice which incriminates a criminal defendant." *Id.* at 544 n.5. *Accord Bruton v. United States*, 391 U.S. 123, 128 n.3 (1968). Even the dissenting Justices in *Lee*, though of the opinion that the hearsay exception for declarations against interest is firmly established, recognized that accomplice confessions which incriminate a defendant do not fit squarely within it:

Indeed, accomplice confessions ordinarily are untrustworthy precisely because they are *not* unambiguously adverse to the penal interest of the declarant. It is of course against one's penal interest to confess to criminal complicity, but often that interest can be advanced greatly by ascribing the bulk of the blame to one's confederates. It is in circumstances raising the latter possibility – circumstances in which the accomplice's out-of-court statements implicating the defendant may be very much in the accomplice's penal interest – that we have viewed the accomplice's statements as "inevitably suspect."

Id. at 552-53 (Blackmun, J., dissenting with whom Powell and Rehnquist, J.J., and Burger, C.J., concurred) (citation omitted). Thus, it appears that this Court has already rejected the notion that hearsay statements like those of Harris fall within a firmly rooted hearsay exception. The fact that they do not is well supported.

Although the hearsay exception for statements against interest has long been recognized, the inclusion of statements against penal interest is relatively recent. Throughout the 18th Century and into the early part of the 19th Century it was customary to admit statements against pecuniary or proprietary interest as an exception to the hearsay rule. 5 J. WIGMORE, *EVIDENCE* § 1476 at 350 (Chadbourn rev. 1974). However, in 1844, in the *Sussex Peerage Case*,³ the House of Lords specifically held that the hearsay exception for declarations against interest did not cover statements subjecting the declarant to criminal liability. *Id.* at 351 n.6; E. CLEARY, *McCORMICK ON EVIDENCE* § 278 at 822-23 (3d ed. 1984). In *Donnelly v. United States*, 228 U.S. 243 (1913), this Court relied on the *Sussex Peerage Case* and the "great and practically unanimous weight of authority" in holding the out-of-court confession of an unavailable declarant inadmissible. *Id.* at 274. This rule was generally followed in this country well into the 20th Century. 5 J. WIGMORE, *supra*, at 352-58 and n.9; *McCORMICK ON EVIDENCE*, *supra*, at 823. This Court noted in *Chambers v. Mississippi*, 410 U.S. 284 (1973), that most states disallowed statements against penal interests from the general "declarations against interest" exception to the hearsay rule. *Id.* at 299.

The Advisory Committee Notes to the proposed 1972 Federal Rules of Evidence reflect that the common law refused "to concede the adequacy of a penal interest" to satisfy the traditional "statement against interest" exception. Fed.R.Evid. 804(b)(3), Notes of Advisory Committee on 1972 Proposed Rules, West's Federal Criminal Code

³ 11 Cl. & F.85, 8 Eng.Rep. 1034 (1844).

and Rules at 285 (1993). The House Committee on the Judiciary noted that the rule eventually enacted as 804(b)(3) would "expand the hearsay limitation from its present federal limitation to include statements subjecting the declarant to criminal liability. . . ." H.R.REP.NO. 650, 93d Cong., 2d Sess., reprinted in 1974 U.S.CODE CONG. & ADMIN. NEWS 7075, 7087. In expanding this limitation to include statements against penal interest, the House Committee specifically amended the draft of the rule before it to exclude "a statement or confession offered against the accused in a criminal case, made by a co-defendant or other person implicating both himself and the accused." See *id.* This addition was not deleted until later drafts and then only because it was deemed unnecessary to codify prevailing constitutional evidentiary principles. S.REP.NO.1277, 93d Cong., 2d Sess., reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 7051, 7068. It has been authoritatively noted that in context, the reasoning for the deletion means that the Rule should be interpreted to include this language. 4 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 804(b)(3)[03] at 804-158 (1993).

Notwithstanding expansion of the rule excepting statements against interest from the hearsay rule to include statements against penal interest, the question of whether statements or confessions of a co-defendant which implicate an accused fall within this exception remains highly controversial. Many of the federal circuit courts of appeals have taken the view that inculpatory confessions of non-testifying accomplices are inadmissible because they fail to even meet Rule 804(b)(3)'s requirement that the statements be against the declarants' penal interest. *E.g.*, *United States v. Magna-Olvera*, 917 F.2d

401, 407-09 (9th Cir. 1990); *United States v. Johnson*, 802 F.2d 1459, 1464-65 (D.C. Cir. 1986); *Fuson v. Jago*, 773 F.2d 55, 60-61 (6th Cir. 1985); *United States v. Riley*, 657 F.2d 1377, 1383-85 (8th Cir. 1981), *cert. denied*, 459 U.S. 111 (1983); *United States v. Palumbo*, 639 F.2d 123, 127-28 (3d Cir.), *cert. denied*, 454 U.S. 819 (1981); *United States v. Sarmiento-Perez*, 633 F.2d 1092, 1102 (5th Cir. Unit A 1981), *cert. denied*, 459 U.S. 834 (1982); *United States v. Lilley*, 581 F.2d 182 (8th Cir. 1978). Other courts continue to exclude these statements for their failure to bear adequate indicia of reliability. *E.g.*, *United States v. Flores*, 985 F.2d 770, 780-83 (5th Cir. 1993); *United States v. Gomez-Lemos*, 939 F.2d 326, 329-32 (6th Cir. 1991); *United States v. Vernor*, 902 F.2d 1182, 1187 (5th Cir.), *cert. denied*, 111 S.Ct. 301 (1990); *United States v. Boyce*, 849 F.2d 833, 836-37 (3d Cir. 1988); *United States v. Alvarez*, 584 F.2d 694, 701-02 (5th Cir. 1978). The continuing reluctance of the federal circuit courts of appeals to admit these hearsay statements highlights the uncertainty of this hearsay exception as applied to inculpatory confessions of accomplices and belies any notion that it is firmly rooted.

Even since the promulgation of the Federal Rules of Evidence, the states have not uniformly embraced the notion that the hearsay exception for statements against interest include post-arrest statements of accomplices which implicate defendants. The evidentiary codes of several states specifically exclude such statements.⁴ Other

⁴ Ark.Stat. § 28-1001; Me.R.Evid. 804(b)(3) (1993); Nev.Rev.Stat.tit. 4 § 51.345; N.D.R.Evid. 804(b)(3); Vt.R.Evid. 804(b)(3); accord Uniform Rule of Evidence 804(b)(3); cf. Fla.Stat. § 90.804(2)(C) (1990) (provision disallowing statements

states have excluded these statements through judicial opinions.⁵ The states' divergent treatment of the issue further indicates that the hearsay exception allowing introduction of post-arrest statements of alleged accomplices which implicate criminal defendants is not firmly rooted.

Cases from the First, Second, Seventh, Tenth, and Eleventh Circuit Courts of Appeals have held that the against-penal-interest exception to the hearsay rule is firmly rooted. *United States v. Seeley*, 892 F.2d 1, 2 (1st Cir. 1989); *United States v. Katsougrakis*, 715 F.2d 769, 775 (2d Cir. 1983), cert. denied, 464 U.S. 1040 (1984); *United States v. York*, 933 F.2d 1343, 1362-64 (7th Cir.), cert. denied, 112 S.Ct. 321 (1991); *Jennings v. Maynard*, 946 F.2d 1502, 1505-06 (10th Cir. 1991); *United States v. Taggart*, 944 F.2d 837, 840 (11th Cir. 1991). These decisions are not persuasive and are in error. *Katsougrakis* was decided before this Court's authoritative decision to the contrary in *Lee*. A later panel of the Second Circuit has questioned its vitality. *United States v. Bakhtiar*, 994 F.2d 970, 977-78 (2d Cir. 1993). See *Latine v. Mann*, 830 F.Supp. 774, 780-81 (S.D.N.Y. 1993) (statements against penal interests not within firmly rooted hearsay exception). *Seeley* simply relied on *Katsougrakis* to support its conclusion. See

inculcating both declarant and accused under statement against interest exception dropped). See generally WEINSTEIN'S EVIDENCE, *supra*, at 804-164-174.

⁵ E.g., *People v. Leach*, 15 Cal.3d 419, 124 Cal.Rptr. 752, 541 P.2d 296 (1975), cert. denied, 424 U.S. 926 (1976); *People v. Nally*, 134 Ill.App.3d 865, 480 N.E.2d 1373 (1985); *State v. Hansen*, 312 N.W.2d 96 (Minn. 1981); *State v. Hughes*, 244 Neb. 810 (1993); *State v. Abourezk*, 359 N.W.2d 137 (S.D. 1984); *State v. St. Pierre*, 759 P.2d 383 (Wash. 1988).

United States v. Innamorati, 996 F.2d 456, 474 n.4 (1st Cir. 1993) (citing *York* for proposition that most courts have concluded declaration against interest exception is firmly rooted).

The Seventh Circuit in *York* held that the declaration against penal interest exception is firmly rooted. *Id.*, 933 F.2d at 1363. In doing so it struggled, but failed, to distinguish this Court's decision in *Lee* and its own prior decision in *Morrison v. Duckworth*, 929 F.2d 1180 (7th Cir. 1991), which held that statements inculcating a third party "do not come within an established hearsay exception." *Id.* at 1181 n.2; see *United States v. Flores*, 985 F.2d 770, 776 n.13 (5th Cir. 1993) (criticizing reasoning of *York* and other cases finding penal interest exception firmly rooted). Even though the court in *York* held that the penal interest exception was firmly rooted, it inconsistently found the need to evaluate the specific circumstances surrounding the statements it was considering. *Id.*, 933 F.2d at 1362-64. *York* might be best read to hold that the against-penal-interest exception is firmly rooted as to only those statements not made to limit the declarant's exposure. *Bakhtiar*, 994 F.2d at 977.

The Tenth and Eleventh Circuit decisions which seem to conclude that the against penal interest exception is firmly rooted are also unconvincing. The Tenth Circuit in *Jennings* and the Eleventh Circuit in *Taggart* seemed to focus on how well the hearsay statements each court was considering, fit within the against-penal-interest hearsay exception, instead of how well established this hearsay exception is according to the relevant factors this Court has identified. *Jennings*, 946 F.2d at 1505-06; *Taggart*, 944 F.2d at 940. The courts in *Jennings* and *Taggart* also found

the need to evaluate the circumstances surrounding the making of the hearsay statements to determine reliability. This would have been unnecessary had the hearsay exception been firmly rooted. *Id.* Thus, none of these decisions are persuasive that the against-penal-interest hearsay exception is firmly rooted.⁶

B. HARRIS'S POST-ARREST STATEMENTS IMPLICATING WILLIAMSON DID NOT BEAR ADEQUATE INDICIA OF RELIABILITY TO RENDER THEM ADMISSIBLE UNDER THE CONFRONTATION CLAUSE.

In a solid line of cases, this Court has recognized that the "truthfinding function of the Confrontation Clause is *uniquely* threatened when an accomplice's confession is sought to be introduced against a criminal defendant without the benefit of cross-examination." *Lee*, 476 U.S. at 541 (emphasis added). In *Douglas v. Alabama*, 380 U.S. 415 (1965), this Court reversed the defendant's conviction because a confession purportedly made by the non-testifying accomplice, which implicated the defendant, was read to the jury by the prosecutor. The Court held that the defendant's "inability to cross examine [the accomplice] as to the alleged confession plainly denied him the right

⁶ The best reasoned decisions, consistent with the analytical framework suggested by the decisions of this Court, are the ones that have found that the against-penal-interest hearsay exception is *not* firmly rooted. *Flores*, 985 F.2d at 778-80; *United States v. Vernor*, 902 F.2d 1182, 1186-87 (5th Cir.), *cert. denied*, 498 U.S. 922 (1990); *Olson v. Green*, 668 F.2d 421, 427 n.11 (8th Cir.), *cert. denied*, 456 U.S. 1009 (1982); *Latine v. Mann*, 830 F.Supp. 774, 780-81 (S.D.N.Y. 1993).

of cross-examination secured by the Confrontation Clause." *Id.* at 419. The holding was premised on the understanding that "when one person accuses another of a crime under circumstances in which the declarant stands to gain by inculcating another, the accusation is presumptively suspect and must be subjected to the scrutiny of cross-examination." *Lee*, 476 U.S. at 451.

Likewise, in *Bruton v. United States*, 391 U.S. 123 (1968), this Court reversed the defendant's conviction because the jury heard his non-testifying co-defendant's confession which implicated him. Despite an instruction limiting consideration of this statement to the co-defendant, this Court concluded that the introduction of the co-defendant's uncross-examined confession violated the defendant's right of confrontation. *Id.* at 135. After noting the "inevitably suspect" credibility of an accomplice's inculpatory statements about his alleged co-conspirator, this Court declared that the unreliability of such a confession is "intolerably compounded" when the alleged accomplice "does not testify and cannot be tested by cross-examination." *Id.* at 136.

In its most recent case, this Court held in *Lee v. Illinois* that the trial judge's reliance upon the post-arrest confession of a non-testifying accomplice in sustaining the defendant's conviction was reversible error. In a murder case in which only one bullet had been fired, the accomplice fingered the defendant as the triggerman. The Court recognized that due to a co-conspirator's "strong motivation to implicate the defendant" in order "to shift or spread blame, curry favor, avenge himself, or divert attention to another," a co-conspirator's post-arrest statements about the defendant's involvement in the crime

must be viewed with "special suspicion." *Id.*, 476 U.S. at 541, 545. "[O]nce partners in crime recognize that the 'jig is up,' they tend to lose any identity of interest and immediately become antagonists, rather than accomplices." *Id.* at 544-45. *Cf. Chambers v. Mississippi*, 410 U.S. 284, 299-300 (1973) (confessions of criminal activity often motivated by extraneous considerations and, thus, not as reliable as statements against pecuniary or proprietary interest).

Turning to the facts of the instant case, not only did the government fail to demonstrate that Harris's hearsay statements had particularized guarantees of trustworthiness, but the circumstances affirmatively established their untrustworthiness. Foremost, declarant Harris's statements were made to the police while in custody. He was arrested immediately following the seizure of the cocaine from his vehicle. Tr.94. He gave his telephonic statement to agent Walton after being in custody approximately one hour. J.A. 33, 52. He gave his second statement to Walton after being in custody for approximately six and one-half hours. J.A. 22, 38, 43. The custodial setting of the interrogation undermined the reliability of the statements. *See Dutton v. Evans*, 400 U.S. 74, 87 (1970) (distinguishing inculpatory statement of declarant to fellow prisoner from those made "in the coercive atmosphere of official interrogation").⁷

⁷ *Accord United States v. Flores*, 985 F.2d 770, 780 (5th Cir. 1993); *United States v. Magna-Olvera*, 917 F.2d 401, 409 (9th Cir. 1990); *United States v. Boyce*, 849 F.2d 833, 836-37 (3d Cir. 1988); *United States v. Riley*, 657 F.2d 1377, 1384 (8th Cir. 1981); *United States v. Palumbo*, 639 F.2d 123, 127-28 (3d Cir. 1981); *United States v. Sarmiento-Perez*, 633 F.2d 1092, 1093, 1102-04 (5th Cir.

Second, Harris's statements were most certainly not spontaneous, but instead were in response to police interrogation. The testimony makes clear that after being arrested and brought to the Dooley County Sheriff's office, Harris was interrogated by state and federal agents. J.A. 20, 25-26, 30, 36-37. He was questioned on the telephone by agent Walton at which time he gave one statement inculpatory Mr. Williamson. He gave his second statements in response to further interrogation designed to set-up a controlled delivery of cocaine, at the Macon Marshal's Service office. Clearly, these were not the type of "spontaneous" statements made without conscious thought or deliberation that might partially support a ruling admitting them. *See White*, 112 S.Ct. at 742-43 (spontaneous out-of-court declaration may carry more weight with jury than in-court statement under oath); *Chambers v. Mississippi*, 410 U.S. 284, 300 (1973) (spontaneity of statement provided indicia of reliability); *Dutton*, 400 U.S. at 88-89 (spontaneity of statement provided indicia of reliability).⁸

A third significant factor tending to negate the reliability of Harris's post-arrest statements is that they were made under circumstances in which Harris had a strong incentive to "shift or spread blame, curry favor, avenge himself, or divert attention to another." *Lee*, 476 U.S. at 545. To be sure,

Unit A 1981); *United States v. Oliver*, 626 F.2d 254, 261 (2d Cir. 1981); *United States v. Love*, 592 F.2d 1022, 1025 (8th Cir. 1979); *United States v. Bailey*, 581 F.2d 341, 345 (3d Cir. 1978); Notes of Advisory Committee on 1972 Proposed Rules, WEST'S FEDERAL CRIMINAL CODE AND RULES at 285 (1993).

⁸ *Accord Palumbo*, 639 F.2d at 133; *Sarmiento-Perez*, 633 F.2d at 1102.

the jig was up. Harris had been arrested and was advised he was facing federal prosecution. He had been caught cold possessing 19 kilograms of cocaine. He was also told before each interrogation session that any cooperation would be relayed to the prosecutor, J.A. 25-26, ostensibly for him to receive some benefit.⁹ Thus, Harris had a tremendous incentive to minimize his own role and shift blame to someone else, in this case Williamson. Harris also had a strong incentive to avenge himself: he was in custody while Mr. Williamson was free.

Harris apparently acted to advance these selfish interests. After a full taste (six and one-half hours) of police custody, he advised his captors that he was a mere courier and the cocaine found in his vehicle was acquired by Williamson, belonged to Williamson, and was intended to be delivered to Williamson. By describing Williamson as his principal and ascribing the bulk of the blame to him, Harris shifted blame, curried favor, avenged himself, and diverted attention to Williamson from himself. *Cf. United States v. Flores*, 985 F.2d 770, 782 (5th Cir. 1993) ("Taking on the full blame for a minor role in an offense, such as claiming to be a mere courier in a drug conspiracy, does little to demonstrate trustworthiness because the declarant still has the motive to shift the

⁹ The government will undoubtedly argue that because the police did not offer a specific benefit to Harris in exchange for his cooperation, he was not motivated to curry favor with his interrogators. Petitioner submits that because Harris was left to fantasize about what benefit he might possibly secure, his incentive to curry favor was even greater than had the interrogators specified the limitations upon what benefit he might actually receive.

blame to others so as to receive a lesser penalty."). Statements made under these circumstances fail to justify any reasonable belief in their trustworthiness.¹⁰

Other circumstances surrounding Harris's statements further undermined their trustworthiness. During his interrogation, Harris gave at least two, if not three different stories concerning the events leading up to his arrest. J.A. 53-57. Although each of these statements tended to implicate Williamson, the material contradictions between them negated their trustworthiness. *See United States v. Cuthel*, 903 F.2d 1381, 1384 (11th Cir. 1990) (district court excluded out-of-court statements on ground statements were not sufficiently trustworthy in light of, *inter alia*, pattern of material inconsistency). Harris indicated his own lack of confidence in his statements by expressing concern that they not be electronically recorded. He balked when he was requested to provide a written statement. J.A. 24. His refusal to incriminate Williamson under oath at trial, despite having been granted use immunity, suggests Harris abandoned his post-arrest statements. Lastly, the custodial statements were made before Harris had any contact with an attorney or his family. *See Boyce*, 849 F.2d at 836. All of these circumstances, individually and cumulatively, vitiated the trustworthiness of Harris's custodial statements.

¹⁰ *Accord Boyce*, 849 F.2d at 836 (nothing in record that indicated declarant was *not* motivated by a desire to curry favor with interrogating agents); *Riley*, 657 F.2d at 1384; *Palumbo*, 639 F.2d at 128; *Sarmiento-Perez*, 633 F.2d at 1102 (desire to curry favor, alleviate culpability, and for revenge might well have been motivation to misrepresent the role of others in the criminal enterprise); *Oliver*, 626 F.2d at 260; *Love*, 592 F.2d at 1026 ("strong incentive to speak whether it be truthfully or falsely").

The district court based its evidentiary ruling on two cases: *United States v. Robinson*, 635 F.2d 363 (5th Cir. Unit B), *cert. denied*, 452 U.S. 916 (1981), J.A. 31, and *United States v. Harrell*, 788 F.2d 1524 (11th Cir. 1986). J.A. 47-52. Both cases are materially distinguishable from the instant case and fail to support its ruling. In *Robinson*, the court rejected the appellants' challenge to the district court's admission of a co-conspirator's post-arrest statement. Concluding that corroborating circumstances sufficiently indicated the trustworthiness of the statement, the court considered the following facts: (1) the declarant was not in custody; (2) the declarant's statement was preceded by Miranda warnings; (3) the interrogating agents gave the declarant no reason to believe it would help him to inculcate others; (4) the declarant never attempted to shift the blame elsewhere; (5) the declarant's statement was judicially determined to have been knowing and voluntary; and (6) the truth of the declarant's statement was corroborated by the totality of the evidence introduced against the defendants at trial. *Id.*, 635 F.2d at 364.

By contrast, in the instant case, declarant Harris was in custody when he gave the inculpatory statements. Although agent Walton testified that the second statement was preceded by Miranda warnings, J.A. 20, 24, there was no evidence that the first statement was preceded by Miranda warnings. Unlike the declarant in *Robinson*, Harris's interrogator specifically advised him before both interrogations that any cooperation he provided would be made known to the prosecutor, implying that some benefit would be provided in exchange. J.A. 25-27. Harris's statements can only be interpreted as

shifting the blame for his criminal conduct to Williamson. Regarding the voluntariness of Harris's statements, though the record does not disclose the court's ruling on Harris's motion challenging the voluntariness of his statements, R.10, 13, 56, 57, 58, 60, this Court observed that a finding that a confession is voluntary has no bearing on the question of whether the confession was also free from any desire, motive, or impulse of the declarant to minimize the appearance of his own culpability and spread the blame to a third person. *Lee*, 476 U.S. at 544. Accord *United States v. Oliver*, 626 F.2d 254, 261 (2d Cir. 1980). Finally in *Idaho v. Wright*, 497 U.S. 805 (1990), this Court rejected the notion relied upon in *Robinson* that other evidence introduced at a defendant's trial can supply the corroboration of a statement necessary to pass muster under the Confrontation Clause. These factual and legal distinctions virtually nullify the precedential value of *Robinson* to the instant case.

The contrast between *Harrell* and the instant case is even more striking. In *Harrell*, the declarant gave the statement spontaneously to an undercover agent whom he believed was a confederate. *Id.*, 788 F.2d at 1525, 1527. Such spontaneous statements, when made to friends or confederates, are widely held to have special guarantees of trustworthiness. See, e.g., *Chambers*, 410 U.S. at 300; *Palumbo*, 639 F.2d at 133; *Sarmiento-Perez*, 633 F.2d at 1102. By contrast, Harris's hearsay statements were made during custodial interrogation to government agents and bore all the attendant characteristics of untrustworthiness. Also, as in *Robinson*, the court in *Harrell* relied upon independent evidence introduced at trial to support its

ruling upholding the district court's admission of statements against interest of unavailable declarants. *Wright* now prohibits consideration of such evidence to establish trustworthiness.

The foregoing analysis demonstrates the overwhelming unreliability of Harris's hearsay statements against Williamson. The admission of these statements violated Mr. Williamson's critical constitutional right to defend against the government's accusations: the right to confront the witnesses against him. Only through the crucible of rigorous cross-examination could Mr. Williamson have fully and fairly tested the credibility of Harris and the trustworthiness of the statements that so severely incriminated him. The denial of this right rendered Williamson's trial fundamentally unfair and requires reversal of his conviction.

C. A POST-ARREST STATEMENT OF A NON-TESTIFYING ALLEGED ACCOMPLICE WHICH INCRIMINATES THE DECLARANT AND A CRIMINAL DEFENDANT AND WAS ELICITED THROUGH CUSTODIAL INTERROGATION IS INHERENTLY UNRELIABLE. ITS INTRODUCTION AT THE DEFENDANT'S SEPARATE TRIAL NECESSARILY VIOLATES THE CONFRONTATION CLAUSE.

This Court has expressed its reluctance to establish bright-line rules of constitutional criminal procedure. *E.g.*, *Florida v. Wells*, 495 U.S. 1 (1990) (rejecting Florida Supreme Court's mechanical "all or nothing" interpretation of Fourth Amendment's limitations on inventory searches); *United States v. Sokolow*, 490 U.S. 1 (1989)

(rejecting Ninth Circuit's bright-line test for analyzing drug courier profile facts in assessing reasonable suspicion). However, the routine and devastating violation of confrontation rights that results from introduction of hearsay statements within the narrow but extremely common class represented by Harris's post-arrest custodial statements fully warrants such a rule of exclusion. This Court has consistently expressed its doubt about the trustworthiness of these hearsay statements in the strongest terms. *Lee*, 476 U.S. 530, 541-43 (1986); *Bruton v. United States*, 391 U.S. 123, 136 (1968); *Douglas v. Alabama*, 380 U.S. 415, 419 (1965). Although this Court, until now, has described them as being only "presumptively unreliable," *Lee* at 541, members of this Court have stressed that the presumption of unreliability is "weighty." *New Mexico v. Earnest*, 477 U.S. 648, 649 (1986) (Rehnquist, Powell, and O'Connor, J.J., and Burger, C.J., concurring in summary vacation of judgment).

In practice, this Court has never sanctioned admission into evidence of a hearsay statement falling within this narrow category. Indeed, the only reasonable interpretation of this Court's cases discussing the admission of these statements at joint trials of the non-testifying declarants and the inculcated co-defendants is that they are strictly inadmissible against the co-defendants. *See, e.g.*, *Richardson v. Marsh*, 481 U.S. 200, 206 (1987); *Cruz v. New York*, 481 U.S. 186, 189-90, 193 (1987); *Parker v. Randolph*, 442 U.S. 62, 73-74 (1979); *Bruton v. United States*, 391 U.S. 123, 126-29 (1968). These cases would make little sense if the Confrontation Clause permitted such hearsay statements to be admitted against the incriminated co-defendant.

A *per se* bar against admission of these statements was included in the early drafts of Federal Rule of Evidence 804(b)(3). H.REP.NO. 93-650, 93d Cong., 2d Sess., reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS p. 7075, 7090; S.REP. 93-1277, 93d Cong., 2d Sess., reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS pp. 7051, 7068; 4 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 804(b)(3)[03] at 804-158 (1993). It was eliminated because the Senate believed, and the House ultimately concurred, that it was unnecessary to codify this constitutional rule. 4 J. WEINSTEIN, *supra*, at 804-158. Judge Weinstein has concluded in his authoritative treatise that "[i]n context, this means the Rule should be interpreted to include this language." *Id.*

This Court's decisions in other, related areas support establishing a bright-line rule of inadmissibility here. In *Miranda v. Arizona*, 384 U.S. 436 (1966), this Court held that confessions elicited through custodial interrogation are *per se* inadmissible at trial if the interrogation is not preceded by an advisement and waiver of the rights to silence and counsel. This rule was established to protect against the coercive circumstances of custodial interrogation, and ensure the reliability of a trial's truth-seeking function. Despite widespread criticism based largely on the suppression of such potentially probative evidence, this Court has strictly adhered to the rule because of its efficacy in protecting the truthfinding function of trials and its significant ease of administration. See *Withrow v. Williams*, ___ U.S. ___, 113 S.Ct. 1745 (1993) (discussing purposes, benefits, and detriments of *Miranda*'s bright-line rule). Likewise, in *Bruton*, this Court created a bright-line rule requiring prosecutors intending to introduce the

confession of a non-testifying defendant which incriminates a co-defendant to either sever the defendants (so the confession would not be admitted at the co-defendant's trial), sanitize the confession to remove any references to the co-defendant and have the jury instructed it cannot consider the non-testifying defendant's confession against the co-defendant, or not use the confession at the joint trial. The manifest purpose of the rule in *Bruton* also was to protect the integrity of the trial's truth-seeking function.

A bright-line rule of exclusion is necessary with regard to hearsay statements such as Harris's for all these same reasons. These statements are inherently unreliable. Absent a full opportunity to cross-examine the declarant, an incriminated defendant is denied the ability to effectively challenge their credibility, sift the conscience of the declarant, and demonstrate the statement's lack of trustworthiness to the jury. Such statements are typically the most damning evidence against a defendant; they are often the key to the entire prosecution. A bright-line rule excluding such statements would add invaluable safeguards to the trial's truthfinding function and would contribute substantially to the efficient administration of justice in the federal courts.¹¹

¹¹ See *United States v. Flores*, 985 F.2d 770, 780-83 and n.27 (5th Cir. 1993) (holding that introduction of statements of unavailable declarant at a defendant's trial, which were elicited through custodial interrogation and incriminated the defendant, categorically violates the Confrontation Clause); *United States v. Sarmiento-Perez*, 633 F.2d 1092, 1093 (5th Cir. Unit A 1981) ("the custodial confession of a non-testifying, separately tried conspirator/co-defendant, insofar as [it] directly impli-

II. HARRIS'S POST-ARREST STATEMENTS INCULPATING WILLIAMSON WERE INADMISSIBLE AS STATEMENTS AGAINST INTEREST UNDER FEDERAL RULE OF EVIDENCE 804(B)(3).

Analysis of the admissibility of Harris's post-arrest statements under Rule 804(b)(3) must begin with the recognition that they were hearsay. Hearsay is any "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Fed.R.Evid. 801(c). Harris's statements were introduced through the testimony of agent Walton. They were offered to prove the truth of the matters asserted, i.e., that Mr. Williamson possessed, and conspired to possess, the cocaine seized from Harris's automobile, and directed Harris's interstate travel for the purpose of carrying on the unlawful activity of distributing cocaine. Consequently, unless they fit within one of the codified exceptions, the statements were inadmissible. Fed.R.Evid. 802.

The statements were offered and admitted into evidence under Federal Rule of Evidence 804(b)(3), titled "Statement against interest." This exception to the hearsay rule applies to statements of unavailable declarants. Fed.R.Evid. 804(b). In relevant part it renders admissible "[a] statement which at the time of its making . . . so far tended to subject the declarant to . . . criminal liability, that a reasonable person in the declarant's position would

cates an accused in the crime charged, . . . is [*per se*] inadmissible because it is not reliable or trustworthy evidence against the accused").

not have made the statement unless believing it to be true." The rule is silent with regard to inculpatory statements, i.e., statements of a declarant which inculcate the defendant. However, with regard to exculpatory statements, the rule further provides: "A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement."

A. TO SECURE ADMISSION OF STATEMENTS IMPLICATING THE DECLARANT AND THE ACCUSED IN A CRIMINAL CASE, THE GOVERNMENT MUST ESTABLISH CORROBORATING CIRCUMSTANCES CLEARLY INDICATING THE TRUSTWORTHINESS OF THE STATEMENTS.

The Rule's legislative history, Committee Notes, and the weight of judicial authority support the conclusion that, to secure the admission of inculpatory statements under this rule, the government must not only demonstrate the unavailability of the declarant and that the statements were contrary to penal interests, but also that the statements satisfy the Confrontation Clause requirement that they be supported by a showing of particularized guarantees of trustworthiness. *See, e.g., Idaho v. Wright*, 497 U.S. 805, ___, 110 S.Ct. 3139, 3148 (1990); *Ohio v. Roberts*, 448 U.S. 56, 66 (1980). As explained above, the House Judiciary Committee initially amended the Rule to exclude from its purview a statement or confession of an accomplice implicating both himself and the accused. H.REP.NO. 93-650, 93d Cong., 2d Sess., reprinted in 1974 U.S. CODE

CONG. & ADMIN. NEWS pp. 7075, 7090. See 4 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 804(b)(3)[03] at 804-158 (1993). The addition was intended to codify *Bruton*. The Senate Judiciary Committee deleted this amendment explaining that it was unnecessary to codify this evolving constitutional principle. S.REP.NO. 93-1277, 93d Cong., 2d Sess., reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS pp. 7051, 7068. The Conference Committee adopted the Senate's version. Notes of Conference Committee, H.REP.NO. 93-1597, WEST'S FEDERAL CRIMINAL CODE AND RULES at p. 288 (1993).

The exchange between the House, Senate, and Conference Committee clearly indicates an intent to superimpose this Court's evolving Confrontation Clause jurisprudence upon Rule 804(b)(3) with regard to inculpatory statements. E.g., *United States v. Alvarez*, 584 F.2d 694, 700 (5th Cir. 1978); see *United States v. Flores*, 985 F.2d 770, 774-77 (5th Cir. 1993); *United States v. York*, 933 F.2d 1343, 1361 (7th Cir. 1991). Although this Court has been careful "not to equate the Confrontation Clause's prohibitions with the general rule prohibiting the admission of hearsay statements, *Idaho v. Wright*, 497 U.S. 805, ___, 110 S.Ct. 3139, 3146 (1990), it has long recognized that "hearsay rules and the Confrontation Clause are generally designed to protect similar values . . . and stem from the same roots." *White v. Illinois*, ___ U.S. ___, ___ 112 S.Ct. 736, 741 (1992) (quoting *California v. Green*, 399 U.S. 149, 155 (1970) and *Dutton v. Evans*, 400 U.S. 74, 86 (1970)). See generally *Ohio v. Roberts*, 448 U.S. at 66 n.9 (noting complexity of reconciling Confrontation Clause and hearsay rules). This approach avoids the unnecessary confusion that would arise if the Rule

adopted one standard for admissibility and this Court demanded adherence to a different standard under the Sixth Amendment. *York*, 933 F.2d at 1361.

In *Ohio v. Roberts*, 448 U.S. 56 (1980), this Court examined the parameters of the Confrontation Clause in determining the admissibility of an unavailable declarant's sworn testimony elicited at the defendant's preliminary hearing. *Id.* at 58-63. After noting the essential value of a face-to-face confrontation between accuser and accused to the integrity of the factfinding process, the Court held that the Constitution forbids admission into evidence of hearsay statements of unavailable declarants unless they are shown to bear "particularized guarantees of reliability." *Id.* at 63-66. This Court's Confrontation Clause jurisprudence continues to adhere to this general requirement. E.g., *Wright*, 110 S.Ct. at 3146. Whether one articulates the test as requiring "corroborating circumstances clearly indicat[ing] the trustworthiness of the statement," Fed.R.Evid. 804(b)(3) (applicable to exculpatory statements), or requiring a showing of "particularized guarantees of reliability," e.g., *Roberts* at 66, in addition to the unavailability of the declarant and a statement contrary to the declarant's penal interests, to secure admission of an inculpatory hearsay statement under Rule 804(b)(3), the proponent must, in addition, make a heightened showing of trustworthiness.¹² In the interests

¹² The First, Second, Third, Fifth, Seventh, Eighth, and Eleventh Circuit Courts of Appeals require that, to secure admission of an inculpatory statement under Rule 804(b)(3), the statement must be corroborated by circumstances clearly indicating its trustworthiness. E.g., *United States v. Seeley*, 892 F.2d 1, 2 (1st Cir. 1989) (citing *Alvarez* with approval); *United States v.*

of simplicity, consistency, and ease of judicial administration, this Court should require the government to establish "corroborating circumstances clearly indicating the trustworthiness of the statement" to secure admission under Rule 804(b)(3).

B. HARRIS'S POST-ARREST STATEMENTS IMPLICATING WILLIAMSON WERE INADMISSIBLE BECAUSE THEY WERE NOT AGAINST HARRIS'S PENAL INTEREST.

The justification for admitting hearsay declarations against interest, notwithstanding their lack of the conventional indicia of reliability, i.e., declarant under oath, subject to cross-examination, available for fact-finder to assess demeanor and credibility, is that a person is unlikely to fabricate a statement against his own interest at the time it is made. *E.g.*, *Chambers v. Mississippi*, 410 U.S. 284, 298-99 (1973). As Federal Rule of Evidence

Katsougrakis, 715 F.2d 769, 775 (2d Cir. 1983); *United States v. Oliver*, 626 F.2d 254, 260 (2d Cir. 1980); *United States v. Palumbo*, 639 F.2d 123, 128 n.5, 131 (3d Cir. 1981); *United States v. Brainard*, 690 F.2d 1117, 1124 (4th Cir. 1982); *United States v. Flores*, 985 F.2d 770, 774 n.10 (5th Cir. 1993); *United States v. Alvarez*, 584 F.2d 694, 701 (5th Cir. 1978); *United States v. Harty*, 930 F.2d 1257, 1262-3 (7th Cir. 1991) (citing *Alvarez* with approval); *United States v. Garcia*, 897 F.2d 1413, 1420 (7th Cir. 1990); *United States v. Riley*, 657 F.2d 1377, 1383, 1385 (8th Cir. 1981) (citing *Alvarez* with approval); *United States v. Taggart*, 944 F.2d 837, 840 (11th Cir. 1991). The Ninth Circuit has specifically reserved judgment on whether, when admission of inculpatory statements is sought, Rule 804(b)(3) requires a demonstration of corroborating circumstances. *See, e.g.*, *United States v. Williams*, 989 F.2d 1061, 1068 (9th Cir. 1993).

804(b)(3) specifically requires, to be admissible the hearsay statement must be one "that a reasonable person in the declarant's position would not have made . . . unless believing it to be true."

The difficulty in applying Rule 804(b)(3)'s "statement against interest" requirement to Harris's hearsay statements is that Harris's declarations contained both self-serving (shifting the blame to Williamson and characterizing him as the principal) and dis-serving (acknowledging complicity) facts. As Judge Weinstein has indicated in his treatise, Rule 804(b)(3) is silent about this "most troublesome" aspect of the declaration against interest exception. WEINSTEIN'S EVIDENCE, *supra*, ¶ 804(b)(3)[02] at 804-150-51. In McCormick's treatise on evidence, three methods of handling these types of hearsay statements are recognized:

First, admit the entire declaration because part is dis-serving and hence by a kind of contagion of trustfulness, all will be trustworthy. Second, compare the strength of the self-serving interests and the dis-serving interest in making the statement as a whole, and admit it all if the dis-serving interest preponderates, and exclude it all if the self-serving interest is greater. Third, admit the dis-serving parts of the declaration, and exclude the self-serving parts.

E. CLEARY, MCCORMICK ON EVIDENCE § 279 at 677 (2d ed. 1972).¹³ McCormick's treatise gave its stamp of approval

¹³ In the 1984 Third Edition to MCCORMICK ON EVIDENCE, the discussion about the three methods of handling declarations containing self-serving and dis-serving facts has been dropped.

to the third method: "The third solution seems the most realistic method of adjusting admissibility to trustworthiness, where the serving and dis-serving parts can be severed." *Id.* Accord WEINSTEIN'S EVIDENCE, *supra*, ¶ 804(b)(3)[03] at 804-160 ("fact that part of the statement was against penal interest does not sufficiently establish trustworthiness"), 163 ("Because of the dangers involved, exclusion should almost always result when a statement against penal interest is offered *against* an accused.").

In *Lee v. Illinois*, 476 U.S. 530 (1986), the majority of the Court clearly placed its imprimatur on McCormick's third approach, excluding the self-serving portions of the declaration. The majority stated: "As we have consistently recognized, a co-defendant's confession is presumptively unreliable as to the passages detailing the defendant's conduct or culpability because those passages may well be the product of the co-defendant's desire to shift or spread blame, curry favor, avenge himself, or divert attention to another." *Id.* at 545. It would appear that even the dissenting Justices would adopt this approach. In reconciling the Court's "customary" approach of treating the confessions of co-defendants

The section still notes the "controversial" issue concerning "contextual or related statements." The new text indicates that in civil cases, "to admit the critical related statement or part of the statement is acceptable, even though not itself against interest, if it is closely enough connected in neutral as to interest." *Id.* at § 279 at 825. The section goes on to note that in criminal cases, judicial scrutiny has been more exacting: "[W]hen the statement is offered by the prosecution to inculcate the accused, an even stricter approach is sometimes found . . . requir[ing] rejection of any part or related statement not in itself against interest." *Id.* at 825-826 (footnote omitted).

with suspicion, with their assessment that the inculpatory portion of the declarant's confession was sufficiently trustworthy to meet Confrontation Clause concerns, the dissenting Justices stated:

It is of course against one's penal interest to confess to criminal complicity, but often that interest can be advanced greatly by ascribing the bulk of the blame to one's confederates. It is in circumstances raising the latter possibility, circumstances in which the accomplice's out-of-court statements implicating the defendant may be very much in the accomplice's penal interest – that we have viewed the accomplice's statements as "inevitably suspect."

Id. at 552-53 (Blackmun, Powell, and Rehnquist, J.J., and Burger, C.J., dissenting).

This third approach has been employed in many federal appellate court decisions to support a conclusion that the inculpatory portion of a co-defendant's confession does not meet the "against penal interest" requirement of Rule 804(b)(3). In *United States v. Magna-Olvera*, 917 F.2d 401 (9th Cir. 1990), the court reversed the district court's finding that the post-arrest statements of a co-conspirator implicating the defendant in a drug conspiracy qualified for admission under Rule 804(b)(3). The court concluded that the statements were not sufficiently against the declarant's interest because they were made under custody, in an attempt to curry favor, upon the government's suggestion of penal benefit for the cooperation, and because the statements trivialized the declarant's role in the drug conspiracy by identifying the defendant as the "kingpin." *Id.* at 409.

In *United States v. Palumbo*, 639 F.2d 123 (3d Cir.), *cert. denied*, 454 U.S. 819 (1981), the court also reversed the defendant's conviction for conspiracy to possess with intent to distribute cocaine, based on the erroneous admission of a co-conspirator's post-arrest hearsay statements which implicated the defendant. Upon arrest, and again before the grand jury, the accomplice stated she received the cocaine found on her person at the time of her arrest from Palumbo. When the accomplice claimed she could not recall the source of the cocaine at trial, the government introduced the accomplice's hearsay statements through the arresting officer. *Id.* at 125-26. Concluding that these hearsay statements were not within the exception for declarations against interest, the court noted that the accomplice's identification of the defendant as the source of the cocaine occurred only after the drugs had been found on her person by police. *Id.* at 128. Although the statement, technically, could have been used to support a conspiracy or possession conviction against the declarant, "[t]he legal implications of her statement may well have been unknown to her." *Id.* The court also found significant that the statement was made in police custody, in response to police questioning, circumstances under which the arrestee's motivation may well have been to curry favor with the authorities. *Id.*

In *United States v. Riley*, 657 F.2d 1377 (8th Cir. 1981), *cert. denied*, 459 U.S. 111 (1983), the court also reversed the defendant's conviction based on its conclusion that the declarant's hearsay statement, though ostensibly against interest, was not in fact against her interest under all the surrounding circumstances at the time it was made. *Id.* at 1385. The court extensively reviewed the

applicable cases, treatises, law review commentaries, and rationale underlying the exception. *Id.* at 1381-84. To support its decision, the court noted that the statement was made in response to custodial interrogation and that, because she had been told a conviction might jeopardize the custody of her child, the declarant may well have believed it was in her best interest to make a statement implicating her co-defendant to ingratiate herself with the authorities. *Id.* at 1384. Additionally, the crime to which the declarant confessed was less serious than the one in which she implicated the defendant. *Id.* Thus, numerous decisions, for good reason, have found that the inculpatory portions of accomplice post-arrest statements which are both self-serving and dis-serving are not, in fact, against the declarant's interests under Rule 804(b)(3) and are inadmissible under Rule 802. *Accord Fuson v. Jago*, 773 F.2d 55, 60-61 (6th Cir. 1985); *United States v. Love*, 592 F.2d 1022, 1025-26 (8th Cir. 1979) ("it may have appeared to [declarant] that her best chance of being released promptly was to make a statement implicating someone else"); *United States v. Lilley*, 581 F.2d 182, 188 (8th Cir. 1978) ("restriction advocated by McCormick excluding portions of statements which are not against the declarant's interest is in keeping with the reasoning behind the 804(b)(3) exception to the hearsay rule").

Using the cited authorities as guidelines, it is apparent that Harris's post-arrest statements were not against penal interest within the meaning of Rule 804(b)(3). It cannot be said "that a reasonable person in [Harris's] position would not have made the statement[s] unless believing [them] to be true." *Id.* The overall tenor of the

statements was self-serving. While the statements certainly implicated Harris in a narcotics offense, they only confirmed what was already obvious to the police from the discovery of the cocaine in his vehicle: Harris was in possession of the cocaine discovered in the trunk. Much more significantly, however, Harris's statements demonstrated a concerted effort to minimize his role in the offense and to shift the blame to Williamson. In each of Harris's statements, he characterized his role as a courier, a person following someone else's directions and concerned only with transportation of the cocaine. By contrast, in each of the statements he characterized Williamson as the principal, the person directing the operation who acquired, owned, and was the intended recipient of, the cocaine. He ascribed the bulk of the blame to Williamson.

The factual setting of Harris's statements gave rise to the strongest motivation to misrepresent the truth in order "to shift or spread blame, curry favor, avenge himself, or divert attention to another. . . ." *Lee v. Illinois*, 476 U.S. at 545. At the time he gave his first statement, he had already been in custody for an hour and knew full well that he was in the worst possible trouble. He was specifically advised that any cooperation he gave would be made known to the prosecutor. Harris's motive and opportunity to falsify his custodial statements could not have been greater. Thus, the portions of Harris's statements implicating Williamson were entirely self-serving. Under a strict test requiring exclusion of all self-serving parts of a declarant's post-arrest statements, these statements should have been excluded. Even under a more moderate test requiring comparison of the strength of

Harris's self-serving interest and his disserving interest, his self-serving interest predominated requiring a finding under Rule 804(b)(3) that his statements were not, in fact, against his penal interest.

C. HARRIS'S POST-ARREST STATEMENTS IMPLICATING WILLIAMSON WERE INADMISSIBLE BECAUSE THE GOVERNMENT FAILED TO ESTABLISH CORROBORATING CIRCUMSTANCES CLEARLY INDICATING THEIR TRUSTWORTHINESS.

As is argued in section II A, *supra*, the legislative history of Rule 804(b)(3) dictates that this Court's applicable Confrontation Clause jurisprudence must be overlaid upon Rule 804(b)(3). That jurisprudence requires that, at a minimum, to secure admission of hearsay statements ostensibly against the declarant's penal interest, the government must establish that the hearsay bears "particularized guarantees of trustworthiness." *E.g.*, *Wright*, 110 S.Ct. at 3146.¹⁴ As is argued in section I B, *supra*, this Court decision in *Wright* limits the government in establishing its circumstantial indicia of reliability to those circumstances that immediately surround the making of the statement and that render the declarant particularly worthy of belief. *Id.*, 110 S.Ct. at 3148. It prohibits

¹⁴ Williamson has argued in section I A, *supra*, that to maintain consistency with the portion of Rule 804(b)(3) dealing with exculpatory statements, to secure admission of inculpatory statements, the government should bear the same burden of establishing corroborating circumstances clearly indicating the trustworthiness of the statements.

the government from attempting to establish trustworthiness based on extraneous facts and circumstances independent of the hearsay statement.

Analysis of the facts offered to establish the trustworthiness of the hearsay statements under Rule 804(b)(3) is identical to the analysis of the same circumstances under the Confrontation Clause. Section I B, *supra*. The same circumstances that failed to establish the trustworthiness of Harris's post-arrest hearsay statements under the Confrontation Clause are similarly inadequate to establish trustworthiness under the Rule.¹⁵

CONCLUSION

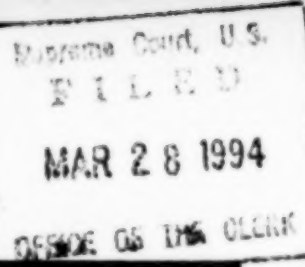
The judgment of the Eleventh Circuit Court of Appeals should be reversed and this matter should be remanded to the district court for a new trial.

Respectfully submitted,

BENJAMIN S. WAXMAN
ROBBINS, TUNKEY, ROSS, AMSEL
& RABEN, P.A.
2250 Southwest Third Avenue
Fourth Floor
Miami, Florida 33129
Telephone: (305) 858-9550

¹⁵ The limitation on the circumstances to be considered under *Wright* make it unnecessary to consider the physical evidence seized from Harris's vehicle or the details of the testimony of the witness who claimed he had sold Williamson cocaine in the past. It is submitted that even were these circumstances to be considered, they would not meet the government's burden of establishing corroborating circumstances clearly indicating the trustworthiness of Harris's hearsay statements.

(7)
No. 93-5256



In the Supreme Court of the United States

OCTOBER TERM, 1993

FREDEL WILLIAMSON, PETITIONER

v.

UNITED STATES OF AMERICA

*ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT*

BRIEF FOR THE UNITED STATES

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

JOHN F. MANNING
Assistant to the Solicitor General

DAVID S. KRIS
Attorney

*Department of Justice
Washington, D.C. 20530
(202) 514-2217*

45pp

QUESTIONS PRESENTED

1. Whether a post-arrest confession by an accomplice implicating a defendant, offered as a statement against penal interest of an unavailable declarant under Fed. R. Evid. 804(b)(3), bears adequate indicia of reliability to render it admissible under Rule 804(b)(3) and the Sixth Amendment Confrontation Clause.

2. Whether a post-arrest confession by an accomplice implicating a defendant, offered as a statement against penal interest of an unavailable declarant under Rule 804(b)(3), constitutes a firmly rooted hearsay exception rendering it presumptively reliable and not subject to further analysis under the Sixth Amendment Confrontation Clause.

3. Whether a statement can be admitted under Rule 804(b)(3) only if it is corroborated by circumstances surrounding the making of the statement that indicate its trustworthiness.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Constitutional provision and rule involved	2
Statement	2
Summary of argument	6
I. Harris's out-of-court statements were admissible as statements against his penal interest	9
A. Post-arrest statements by an accomplice are not per se inadmissible under Rule 804 (b)(3)	9
B. Harris's statements to the interviewing agent were genuinely against his penal interest ...	20
C. The portions of Harris's statements that in- culpatd petitioner were properly admitted along with the portions that inculpatd Harris	23
II. Statements admitted as declarations against penal interest satisfy the Confrontation Clause because they fall within a "firmly rooted" hear- say exception	24
III. Neither Rule 804(b)(3) nor the Confrontation Clause requires corroboration of a statement against interest	34
Conclusion	36

TABLE OF AUTHORITIES

Cases:

<i>Aetna Life Ins. Co. v. Strauch</i> , 67 P.2d 452 (Okla. 1937)	30
<i>Agnew v. State</i> , 446 A.2d 425 (Md. Ct. Spec. App. 1982)	27
<i>Berrisford v. Wood</i> , 826 F.2d 747 (8th Cir. 1987), cert. denied, 484 U.S. 1016 (1988)	28

IV

Cases—Continued:	Page
<i>Bourjaily v. United States</i> , 483 U.S. 171 (1987) . . .	19, 25
<i>Bruton v. United States</i> , 391 U.S. 123 (1968)	13, 15, 16, 32
<i>Commonwealth v. Carr</i> , 369 N.E.2d 970 (Mass. 1977)	27
<i>Crowder v. State</i> , 227 S.E.2d 230 (Ga. 1976)	27
<i>Cruz v. New York</i> , 481 U.S. 186 (1987)	32
<i>Donnelly v. United States</i> , 228 U.S. 243 (1913)	30, 31
<i>Douglas v. Alabama</i> , 380 U.S. 415 (1965)	12, 15, 32
<i>Dutton v. Evans</i> , 400 U.S. 74 (1970)	31
<i>Flowers v. State</i> , 586 So. 2d 978 (Ala. Crim. App.), cert. denied, 596 So. 2d 954 (Ala. 1991), cert. denied, 112 S. Ct. 1995 (1992)	27
<i>Hines v. Commonwealth</i> , 117 S.E. 843 (Va. 1923)	31
<i>Howard v. Jessup</i> , 519 P.2d 913 (Okla. 1973)	30
<i>Idaho v. Wright</i> , 497 U.S. 805 (1990) . . . 10, 25, 26, 34, 35	
<i>Jennings v. Maynard</i> , 946 F.2d 1502 (10th Cir. 1991)	18, 28
<i>Laumer v. United States</i> , 409 A.2d 190 (D.C. 1979)	27
<i>Lee v. Illinois</i> , 476 U.S. 530 (1986)	13, 14, 15, 22, 23, 26, 32, 33
<i>Masson v. New Yorker Magazine, Inc.</i> , 111 S. Ct. 2419 (1991)	11
<i>Mattox v. United States</i> , 156 U.S. 237 (1895)	26
<i>Morrison v. Duckworth</i> , 929 F.2d 1180 (7th Cir. 1991)	28
<i>New Mexico v. Earnest</i> , 477 U.S. 648 (1986)	15
<i>Ohio v. Roberts</i> , 448 U.S. 56 (1980)	24, 25, 26, 35
<i>Osborne v. Purdome</i> , 250 S.W.2d 159 (Mo. 1952)	31
<i>People v. Gordon</i> , 792 P.2d 251 (Cal. 1990), cert. denied, 499 U.S. 913 (1991)	12, 28
<i>People v. Spriggs</i> , 389 P.2d 377 (Cal. 1964)	31

V

Cases—Continued:	Page
<i>State v. Abourezk</i> , 359 N.W.2d 137 (S.D. 1984) . . .	28
<i>State v. Hansen</i> , 312 N.W.2d 96 (Minn. 1981)	27, 28
<i>State v. Leisure</i> , 838 S.W.2d 49 (Mo. Ct. App. 1992)	27
<i>Sussex Peerage Case</i> , 11 Cl. & F. 85 (H.L. 1844) . .	29
<i>United States v. Bakhtiar</i> , 994 F.2d 970 (2d Cir.), cert. denied, 114 S. Ct. 554 (1993)	28
<i>United States v. Barrett</i> , 539 F.2d 244 (1st Cir. 1976)	23-24
<i>United States v. Carruth</i> , 699 F.2d 1017 (9th Cir. 1983), cert. denied, 464 U.S. 1038 (1984)	18
<i>United States v. Casamento</i> , 887 F.2d 1141 (2d Cir. 1989), cert. denied, 493 U.S. 1081 (1990)	24
<i>United States v. Coachman</i> , 727 F.2d 1293 (D.C. Cir. 1984)	17, 18
<i>United States v. Flores</i> , 985 F.2d 770 (5th Cir. 1993)	28
<i>United States v. Garcia</i> , 897 F.2d 1413 (7th Cir. 1990)	18
<i>United States v. Garriss</i> , 616 F.2d 626 (2d Cir.), cert. denied, 447 U.S. 926 (1980)	12
<i>United States v. Gonzalez</i> , 559 F.2d 1271 (5th Cir. 1977)	19
<i>United States v. Harris</i> , 403 U.S. 573 (1971)	15, 31, 32
<i>United States v. Johnson</i> , 802 F.2d 1459 (D.C. Cir. 1986)	19
<i>United States v. Katsougrakis</i> , 715 F.2d 769 (2d Cir. 1983), cert. denied, 464 U.S. 1040 (1984) . . .	28
<i>United States v. Koskerides</i> , 877 F.2d 1129 (2d Cir. 1989)	18
<i>United States v. Lieberman</i> , 637 F.2d 95 (2d Cir. 1980)	23
<i>United States v. Love</i> , 592 F.2d 1022 (8th Cir. 1979)	19
<i>United States v. Magna-Olvera</i> , 917 F.2d 401 (9th Cir. 1990)	19

VI

Cases — Continued:

	Page
<i>United States v. Matlock</i> , 415 U.S. 164 (1974)	32
<i>United States v. Palumbo</i> , 639 F.2d 123 (3d Cir.), cert. denied, 454 U.S. 819 (1981)	19
<i>United States v. Robinson</i> , 635 F.2d 363 (5th Cir.), cert. denied, 452 U.S. 916 (1981)	18
<i>United States v. Scopo</i> , 861 F.2d 339 (2d Cir. 1988), certs. denied, 490 U.S. 1022 and 490 U.S. 1048 (1989)	12, 13, 18
<i>United States v. Seeley</i> , 892 F.2d 1 (1st Cir. 1989) . .	28
<i>United States v. Taggart</i> , 944 F.2d 837 (11th Cir. 1991)	28
<i>United States v. Winley</i> , 638 F.2d 560 (2d Cir. 1981), cert. denied, 455 U.S. 959 (1982)	18
<i>United States v. York</i> , 933 F.2d 1343 (7th Cir.), cert. denied, 112 S. Ct. 321 (1991)	28
<i>Weber v. Chicago, R.I. & P. Ry.</i> , 151 N.W. 852 (Iowa 1915)	30
<i>White v. Illinois</i> , 112 S. Ct. 736 (1992)	10, 13, 25, 26, 28, 35

Constitution, statutes and rules:

U.S. Const.:	
Amend. V	4
Amend. VI (Confrontation Clause)	<i>passim</i>
18 U.S.C. 1952	2
18 U.S.C. 6001 <i>et seq.</i>	20
21 U.S.C. 841(a)(1)	2
21 U.S.C. 846	2
Cal. Evid. Code § 1230 (West 1966)	26
Fla. Stat. Ann. § 90.804(2)(c) (West Supp. 1994) . .	26
Kan. Stat. Ann. § 60-460(j) (Supp. 1992)	27
La. Code Evid. Ann. art. 804(B)(3) (West 1994) . . .	27
Neb. Rev. Stat. § 27-804(2)(c) (1989)	27

VII

Statutes and rules — Continued:

	Page
Nev. Rev. Stat. Ann. § 51.345 (Michie 1986)	27
Okla. Stat. Ann. tit. 12, § 2804(B)(3) (West 1993) . .	18, 27
Or. Rev. Stat. § 40.465(3)(c) (1989)	27
S.D. Codified Laws Ann. § 19-16-32 (1987)	27
Fed. R. Crim. P. 11	12, 18
Fed. R. Evid.:	
Rule 104(a)	19
Rule 801(d)(2)(E)	5, 25
Rule 803(2)	19
Rule 804	20
advisory committee note, 28 U.S.C. App. at 789	11, 30
advisory committee note, 28 U.S.C. at 790	16, 23, 32, 34
Rule 804(b)	2
Rule 804(b)(2)	19
Rule 804(b)(3)	<i>passim</i>
Alaska R. Evid. 804(b)(3)	26
Ariz. R. Evid. 804(b)(3)	26
Ark. R. Evid. 804(b)(3)	27
Colo. R. Evid. 804(b)(3)	26
Del. Unif. R. Evid. 804(b)(3)	26
Haw. R. Evid. 804(b)(3)	27
Idaho R. Evid. 804(b)(3)	27
Iowa R. Evid. 804(b)(3)	27
Ky. R. Evid. 804(b)(3)	27
Me. R. Evid. 804(b)(3)	27
Mich. R. Evid. 804(b)(3)	27
Minn. R. Evid. 804(b)(3)	27
Miss. R. Evid. 804(b)(3)	27
Mont. R. Evid. 804(b)(3)	27

VIII

Rules — Continued:	Page
N.H. R. Evid. 804(b)(3)	27
N.M. R. Evid. 11-804(b)(4)	27
N.C. R. Evid. 804(b)(3)	27
N.D. R. Evid. 804(b)(3)	27
Ohio R. Evid. 804(b)(3)	27
R.I. R. Evid. 804(b)(3)	27
Tenn. R. Evid. 804(b)(3)	27
Tex. R. Crim. Evid. 803(24)	27
Utah R. Evid. 804(b)(3)	27
Vt. R. Evid. 804(b)(3)	27
Wash. R. Evid. 804(b)(3)	27
W. Va. R. Evid. 804(b)(3)	27
Wis. R. Evid. 908.045(4)	27
Wyo. R. Evid. 804(b)(3)	27

Miscellaneous:

Comment, 1 Cal. L. Rev. 475 (1913)	30
Comment, 9 Cornell L. Q. 57 (1924)	30
Comment, 10 Va. L. Rev. 83 (1924)	30
H.R. Conf. Rep. No. 1597, 93d Cong., 2d Sess. (1974)	17
H.R. Rep. No. 650, 93d Cong., 1st Sess. (1973) ...	17
Jefferson, <i>Declarations Against Interest: An Exception to the Hearsay Rule</i> , 58 Harv. L. Rev. 1 (1944)	30
4 D. Louisell & C. Mueller, <i>Federal Evidence</i> (1980)	19
2 McCormick on Evidence (J. Strong ed., 4th ed. 1992)	24, 30
Morgan, <i>Declarations Against Interest</i> , 5 Vand. L. Rev. 451 (1952)	29, 30

IX

Miscellaneous — Continued:	Page
Note, <i>Declarations Against Penal Interest: Standards of Admissibility Under an Emerging Majority Rule</i> , 56 B.U. L. Rev. 148 (1976)	29-30, 31
Note, 13 Va. L. Rev. 41 (1927)	29
<i>Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates</i> , 46 F.R.D. 161 (1969)	16-17
Recent Case, 37 Harv. L. Rev. 156 (1924)	30
<i>Rules of Evidence for United States Courts and Magistrates</i> , 56 F.R.D. 183 (1972)	17
S. Rep. No. 1277, 93d Cong., 2d Sess. (1974)	17
5 J. Wigmore, <i>Evidence</i> (J. Chadbourn rev. ed. 1974)	10, 11, 29

In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-5256

FREDEL WILLIAMSON, PETITIONER

v.

UNITED STATES OF AMERICA

*ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT*

BRIEF FOR THE UNITED STATES

OPINION BELOW

The judgment order of the court of appeals affirming petitioner's conviction (J.A. 78) is unpublished, but the judgment is noted at 981 F.2d 1262 (Table).

JURISDICTION

The judgment of the court of appeals was entered on December 23, 1992. J.A. 78. A petition for rehearing was denied on March 24, 1993. J.A. 79. On June 16, 1993, Justice Kennedy extended the time for filing a petition for a writ of certiorari to and including July 15, 1993. The petition was filed on that date and was granted on January 10, 1994. J.A. 80. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION AND RULE INVOLVED

The Confrontation Clause of the Sixth Amendment to the United States Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him.

Rule 804(b) of the Federal Rules of Evidence provides in pertinent part as follows:

The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

* * * * *

(3) **Statement against interest.** A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Georgia, petitioner was convicted of conspiring to possess, and of possessing, cocaine with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and 846, and engaging in interstate travel to promote the distribution of cocaine, in violation of 18 U.S.C. 1952. The district court sentenced petitioner to 327 months in prison, to be followed by five years of supervised release. J.A. 71-77. The court of appeals affirmed. J.A. 78.

1. On March 26, 1989, a deputy sheriff in Dooly County, Georgia, stopped a rental car driven by Reginald Harris because the car was weaving on an interstate highway. Harris consented to a search of the car. The search revealed 19 kilograms of cocaine in luggage in the trunk. The luggage bore the initials of petitioner's sister. Petitioner was listed as an additional driver on the car rental agreement. An envelope addressed to petitioner and a receipt bearing petitioner's girlfriend's address were found inside the glove compartment. Tr. 79-97, 100-103, 107-108, 256.

Harris was arrested, and Special Agent Donald Walton of the Drug Enforcement Administration twice interviewed Harris. Agent Walton first spoke with Harris by telephone shortly after his arrest. Walton testified that during that conversation, Harris said he had obtained 19 kilograms of cocaine from an unidentified Cuban in Fort Lauderdale, Florida; that the cocaine belonged to petitioner; and that it was to be delivered that night to a dumpster located behind a service station on Redan Road in Atlanta. J.A. 37; see also J.A. 27-30, 54-55.

Several hours later, Agent Walton spoke to Harris in person. During that interview, Harris said he had rented the car a few days earlier and had driven it to Fort Lauderdale to meet petitioner. Harris said he had obtained the cocaine from a Cuban who was an acquaintance of petitioner. Harris told Walton that the Cuban had placed the cocaine in the rental car with a note instructing him on how to deliver the drugs. Harris repeated that he had been instructed to take the drugs to a dumpster in the parking lot of a service station on Redan Road in Atlanta, and to deposit the cocaine in the dumpster, to return to his car, and to leave without waiting for anyone to pick up the drugs. J.A. 38-39.

Agent Walton then took steps to arrange a controlled delivery of the cocaine. As Walton was preparing to leave the interview room to arrange the delivery, however, Harris admitted that he had lied about the Cuban, the note, and the delivery to the dumpster. Harris "got out of his chair * * * and * * * took a half step toward [Walton] * * * and * * * said, 'I can't let you do that,' threw his hands up and said 'that's not true, I can't let you go up there for no reason.'" J.A. 40. Harris then said that at the time he was stopped on the interstate highway, he was transporting the cocaine to Atlanta for petitioner, and that petitioner was traveling in front of him in another rental car. Harris added that after Harris's car was stopped, petitioner turned around and drove past the location of the stop, where he was able to see Harris's car with its trunk open. *Ibid.* Because petitioner had apparently seen the police searching Harris's car, Harris explained that it would be impossible to make a controlled delivery. J.A. 41.

Harris told Agent Walton that he had previously lied about the source of the drugs because he was afraid of petitioner. J.A. 61, 68; see also J.A. 30-31. Although Harris freely implicated himself, he was concerned that his story would be recorded, and he refused to sign a written version of his statement. J.A. 24-25.

Agent Walton further testified that he had promised to report any cooperation by Harris to the Assistant United States Attorney. Walton said that Harris was not promised any reward or other benefit for cooperating. J.A. 25-26.

2. When called to testify at petitioner's trial, Harris invoked his Fifth Amendment privilege against compelled self-incrimination. Although he was given use immunity, Harris refused to testify despite a court order directing him to do so. J.A. 9-15. The district court then ruled that

Agent Walton could relate what Harris had said to him. The court admitted Harris's statements under Fed. R. Evid. 804(b)(3) as statements against penal interest. J.A. 51-52.¹ The court explained:

The ruling of the Court is that the statements made by defendant Harris to Agent Walton are admissible under [Rule 804(b)(3)], which deals with statements against interest.

First, defendant Harris' statements clearly implicated himself, and therefore, are against his penal interest.

Second, defendant Harris, the declarant, is unavailable.

And third, as I found yesterday, there are sufficient corroborating circumstances in this case to ensure the trustworthiness of his testimony. Therefore, under [*United States v. Harrell*, 788 F.2d 1524 (11th Cir. 1986)], these statements by defendant Harris implicating [petitioner] are admissible.

Ibid. See also J.A. 31 ("this Court finds that the corroborating circumstances clearly indicate the trustworthiness of the statement").

3. On appeal, petitioner argued that Harris's statements to Agent Walton were not admissible under Fed. R. Evid. 804(b)(3) or the Confrontation Clause of the Sixth Amendment. Pet. C.A. Br. 12-24. The court of appeals affirmed without opinion. J.A. 78.

¹ Initially, the court appears to have ruled that the statements were admissible as statements of a co-conspirator made in furtherance of a conspiracy under Fed. R. Evid. 801(d)(2)(E). See J.A. 34-36, 47. At the close of Agent Walton's direct testimony, however, the court stated that it was admitting the evidence under Fed. R. Evid. 804(b)(3). J.A. 51-52.

SUMMARY OF ARGUMENT

I. This case raises questions about the interaction of the Confrontation Clause and the federal hearsay exception for statements against interest, Fed. R. Evid. 804(b)(3). Rule 804(b)(3) authorizes the admission of an out-of-court statement by an unavailable declarant if the district court finds that the statement is so far contrary to the declarant's interest that "a reasonable person in the declarant's position would not have made the statement unless believing it to be true." Where the declarant's penal interest is at issue, the Rule requires the district court to make a determination in each case that the statement in question actually exposed the declarant to criminal liability and that it did so in a manner and to a degree that provides a substantial guarantee against falsehood.

A. Because the Rule requires a case-specific determination that the statement in question is truly against the declarant's penal interest to the extent necessary to provide assurance of reliability, the Rule does not make broad classes of statements per se admissible or per se inadmissible. It is therefore contrary to the principle underlying the Rule to suggest that post-arrest confessions by an accomplice can never be admissible. Even if some accomplice confessions are not sufficiently against the accomplice's penal interest to the degree necessary to guarantee reliability, other such confessions may satisfy the specific showing required by the Rule and thus be admissible. The question is one that cannot be answered categorically, but must be addressed based on the circumstances of each case.

B. The district court was correct in finding Harris's statements to be so contrary to his penal interest that it is unlikely that a reasonable person would have made the

statements if he had not believed them to be true. The statements clearly exposed Harris to prosecution for drug possession and conspiracy; they provided the government with critical evidence that Harris knew drugs were in the trunk of the car — something that would not have been established by the mere discovery of the drugs, particularly since the drugs were found in a suitcase bearing someone else's initials. In addition, Harris's statement did not minimize his own involvement in the offense while shifting blame for the offense to petitioner, and Harris was not offered any kind of plea or cooperation agreement that would have reduced his criminal exposure in exchange for statements incriminating petitioner.

Moreover, Harris's revision of his story, when Agent Walton was about to test it, provided a firm basis for believing that the revised version of the story was true. In his initial account, Harris sought to conceal petitioner's role in accompanying the cocaine during its transportation and as the ultimate recipient of the cocaine. His revised account, in which he revealed the full extent of petitioner's involvement in the scheme, was thus particularly trustworthy because it was made at a time when Harris recognized that his story would be subject to verification and his troubles would be worse if he were found to have persisted in lying to the officers.

C. Rule 804(b)(3) does not limit admission to those specific portions of a confession that directly inculcate the declarant. As long as a statement is against the declarant's penal interest, all parts of the statement that are integrally related to the inculpatory portion are admissible. Harris's references to petitioner were an integral part of his confession, and thus were properly admitted under the Rule.

II. The admission of Harris's statements did not violate the Confrontation Clause. If particular out-of-court statements are admitted under a firmly rooted hearsay exception, it is not necessary to conduct a separate inquiry into whether the statements bear sufficient indicia of reliability to satisfy the Confrontation Clause. The hearsay exception for statements against penal interest, as articulated in Rule 804(b)(3), is a firmly rooted exception, and for that reason evidence that is admissible under the Rule does not have to pass a second, and separate, Confrontation Clause test.

There has long been a hearsay exception for statements against interest by declarants who are unavailable to testify at trial. That exception is undoubtedly a "firmly rooted" exception, at least as to statements against pecuniary or proprietary interest. Petitioner argues that the "penal interest" branch of that exception is not firmly rooted, because for a period of time beginning in the mid-19th century, that branch of the exception was not recognized in federal law and in many States. The recent trend, however, has been in favor of recognizing statements against penal interest as falling within the hearsay exception for statements against interest, and the "penal interest" branch of the exception is now recognized in the Federal Rules of Evidence and in a substantial majority of the States. The "penal interest" branch of the statements-against-interest exception to the hearsay rule is therefore properly regarded as among the firmly rooted hearsay exceptions for which the Confrontation Clause imposes no "second tier" test for reliability. Accordingly, once Harris's statements were found to be admissible under Rule 804(b)(3), the Confrontation Clause imposed no barrier to their admission.

III. Neither Rule 804(b)(3) nor the Confrontation Clause requires the government to establish corroborating circumstances that would indicate the trustworthiness of the statement. The Rule requires a showing of corroborating circumstances only in the case of statements against penal interest that are offered to *exculpate* a criminal defendant; it therefore cannot be read to impose such a requirement in *all* cases. With respect to the Confrontation Clause, the determination that the hearsay exception for statements against penal interest is "firmly rooted" obviates the need for a special showing of corroborating circumstances with respect to each statement offered for admission. In any event, however, because Rule 804(b)(3) requires the court to find that a reasonable person would not have made the statement unless believing it to be true, the reliability concerns that are raised when hearsay is admitted over a Confrontation Clause objection are satisfied by the requirements of the Rule itself. Thus, the very requirements of the Rule serve the same function of guaranteeing reliability that is served by the requirement of corroborating circumstances that the Confrontation Clause imposes on statements not falling within traditional exceptions to the hearsay rule.

ARGUMENT

I. HARRIS'S OUT-OF-COURT STATEMENTS WERE ADMISSIBLE AS STATEMENTS AGAINST HIS PENAL INTEREST

A. Post-Arrest Statements By An Accomplice Are Not Per Se Inadmissible Under Rule 804(b)(3)

Petitioner contends (Br. 30-33) that this Court should adopt a per se rule that no post-arrest confession by an

accomplice implicating a defendant should be admitted as a statement against penal interest under Fed. R. Evid. 804(b)(3). There is nothing in the text or history of Rule 804(b)(3) that requires the categorical exclusion of statements of that sort. Instead, the Rule is designed to permit the admission of any statement that is truly against the declarant's penal interest, in light of all the circumstances.

1. The rule against the admission of hearsay evidence reflects the traditional understanding that "many possible sources of inaccuracy and untrustworthiness which may lie underneath the bare untested assertion of a witness can best be brought to light and exposed * * * by the test of cross-examination." 5 J. Wigmore, *Evidence* § 1420, at 251 (J. Chadbourn rev. ed. 1974). The law, however, recognizes exceptions to the hearsay rule where "statements are given under circumstances that eliminate the possibility of fabrication, coaching, or confabulation, and * * * the circumstances surrounding the making of the statement [therefore] provide sufficient assurance that the statement is trustworthy and that cross-examination would be superfluous." *Idaho v. Wright*, 497 U.S. 805, 820 (1990) (discussing the "excited utterance," "dying declaration," and "medical treatment" exceptions to the hearsay rule). See also, e.g., *White v. Illinois*, 112 S. Ct. 736, 742 n.8 (1992).

Rule 804(b)(3) is an exception to the hearsay rule. It authorizes the admission of an out-of-court statement by an unavailable declarant if the statement, at the time of its making, was "so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the

statement unless believing it to be true."²

The exception for statements against penal interest is founded on "the principle of experience that a statement asserting a fact distinctly against one's interest is unlikely to be deliberately false or heedlessly incorrect, and is thus sufficiently sanctioned, though oath and cross-examination are wanting." 5 J. Wigmore, *supra*, § 1457, at 329. As this Court recently explained:

It is against self-interest to admit one's own criminal liability * * * and so all the more easy to credit when it happens. This principle underlies the elemental rule of evidence which permits the introduction of admissions, despite their hearsay character, because we assume "that persons do not make statements which are damaging to themselves unless satisfied for good reason that they are true."

Masson v. New Yorker Magazine, Inc., 111 S. Ct. 2419, 2430 (1991) (quoting Fed. R. Evid. 804 advisory committee note, 28 U.S.C. App. at 789). As in the case of other exceptions to the hearsay rule, therefore, a central premise of the statement-against-penal-interest exception is that the nature of the statement and the circumstances surrounding it provide a sufficient warranty of its reliability. In fact, Rule 804(b)(3) provides an even more direct guarantee of reliability than is provided by other hearsay exceptions, because the exception is not triggered simply by the fact that the statement is against the declarant's interest; instead, it requires that the trial court find the statement to be so clearly contrary to the declarant's interest,

² Rule 804(b)(3) imposes an additional condition on the admission of statements against penal interest when those statements are offered to exculpate a defendant in a criminal case: such statements are not admissible, the Rule provides, "unless corroborating circumstances clearly indicate the trustworthiness of the statement."

under all the circumstances, that a reasonable person would not have made the statement unless he believed it to be true.

There is nothing about an accomplice's post-arrest statement that categorically precludes it from satisfying the elements of Rule 804(b)(3). In some cases, of course, an accomplice's confession will actually be *in* his penal interest and therefore not admissible under the Rule. For example, if the declarant is a suspect in a case of assault with intent to kill, and his confession includes the fact that his co-defendant fired the shot, the confession may to that extent serve the declarant's penal interest by attempting to shift blame for the assault itself. See *Douglas v. Alabama*, 380 U.S. 415, 417, 420 (1965). There will also be circumstances, however, in which a defendant inculcates a third party in a way that is clearly *against* his penal interest. For example, if the declarant tells the police during interrogation that he took perpetrators of an armed robbery into his home after the robbery, the declarant has admitted to being an accessory to the crime. Absent some reason to think the declarant was seeking to shift blame or curry favor by making that admission, a trial court would be justified in finding that a reasonable person in the declarant's position would not have made a statement describing his conduct unless he believed it to be true. See *People v. Gordon*, 792 P.2d 251, 265-269 (Cal. 1990), cert. denied, 499 U.S. 913 (1991); see also *United States v. Garriss*, 616 F.2d 626, 631 (2d Cir.), cert. denied, 447 U.S. 926 (1980). The question whether the statement was truly against the declarant's interest is therefore a highly factual one that resists categorical answers based simply on whether the declarant makes a post-arrest statement to the authorities that is offered against an alleged accomplice.³

³ The Second Circuit's decision in *United States v. Scopo*, 861 F.2d 339, 348-349 (1988) (statement against penal interest made during plea allocution under Fed. R. Crim. P. 11), certs. denied, 490 U.S. 1022

This Court has cautioned that an accomplice's inculpatory confession should be treated with suspicion because it "may well be the product of the codefendant's desire to shift or spread blame, curry favor, avenge himself, or divert attention to another." *Lee v. Illinois*, 476 U.S. 530, 545 (1986). See also *Bruton v. United States*, 391 U.S. 123, 136 (1968). But the Court has never treated that concern as a basis for holding that inculpatory confessions are categorically excluded from admission under the hearsay exception in Rule 804(b)(3) or under the Confrontation Clause. In fact, this Court's cases construing the Confrontation Clause, which addresses concerns similar to those underlying the hearsay rule, see *White v. Illinois*, 112 S. Ct. at 741, hold that the reliability of such confessions turns on the totality of the circumstances surrounding the particular statement sought to be admitted.

In *Lee v. Illinois*, *supra*, for example, this Court held that the admission of a nontestifying co-defendant's inculpatory confession violated the Confrontation Clause. Significantly, the Court did not apply a per se rule barring the admission of all such confessions. Instead, the Court

and 490 U.S. 1048 (1989), illustrates the importance of examining the precise circumstances in which a statement was made (861 F.2d at 348 (citations omitted)):

In general a plea of guilty is a statement against the penal interest of the pleader for the obvious reason that it exposes him to criminal liability. Likewise, so much of the allocution as states that that defendant committed or participated in the commission of a crime, thereby permitting the court to accept the plea, is normally against his interest. If, however, a pleading defendant had an agreement with the government or with the court that he would not be punished for the crimes to which he allocuted, then that allocution would not subject him to criminal liability and would not constitute a statement against his penal interest within the meaning of Rule 804(b)(3).

carefully analyzed the particular circumstances surrounding the confession in that case in determining its admissibility under the Confrontation Clause.

Lee involved two murders in which both defendants were implicated. As the Court emphasized, the nontestifying co-defendant, Edwin Thomas, had refused to talk to the police until after being told that the defendant, Millie Lee, "had already implicated him and only after he was implored by Lee to share 'the rap' with her." 476 U.S. at 544. The Court also emphasized that Thomas had more than "a theoretical motive" to distort his account of the events; the record reflected that prior to trial he had been "actively considering the possibility of becoming [Lee's] adversary * * * [by] becoming a witness for the State." *Ibid.* Finally, the Court noted that there were significant discrepancies in the two defendants' stories relating to the roles that each played in the murder and to the issue of premeditation. *Id.* at 545-546. Under those circumstances, the Court determined that Thomas's inculpatory confession was not sufficiently reliable to be admitted over a Confrontation Clause objection.

Lee does not support adoption of a categorical rule of inadmissibility for accomplice confessions that implicate the defendant; indeed, the analysis in *Lee* supports just the opposite approach. If a nontestifying co-defendant's inculpatory confessions were always deemed too unreliable to be admitted without cross-examination, the Court in *Lee* would have had no reason to examine the precise circumstances surrounding Thomas's confession. *Lee* therefore suggests that the reliability of such a statement depends on the totality of the circumstances, including the substance of the statement and the setting in which it was made. Although the Court in *Lee* characterized co-defendants' confessions as "presumptively unreliable" and "presumptively suspect," 476 U.S. at 539, 541, the Court

did not hold (and has never held) such confessions "*per se* inadmissible under the Confrontation Clause," *id.* at 552 (Blackmun, J., dissenting); nor has the Court suggested that such statements may not be found to be reliable when they are genuinely against the declarant's penal interest. See *New Mexico v. Earnest*, 477 U.S. 648, 649 (1986) (Rehnquist, J., concurring).⁴

2. The Advisory Committee Note accompanying Rule 804(b)(3) makes clear that the Rule was designed to adopt a case-by-case approach to the admission of statements by a nontestifying accomplice that inculcate the defendant. The Advisory Committee made that point clear in its discussion of this Court's pre-Rule decisions in *Douglas v. Alabama*, *supra*, and *Bruton v. United States*, *supra*. *Douglas* held that it was error to place before the jury a co-defendant's confession implicating the defendant as the trigger man in a case charging both defendants with assault with intent to kill. In *Bruton*, the Court held that the trial court abused its discretion by not severing a trial in which the government introduced the inculpatory confession of a co-defendant. Although the inadmissibility of the confession was uncontested in *Bruton*, and the only question in the case was whether a limiting instruction was sufficient to ensure that the jury did not consider the confession against both defendants, the Court noted in passing that the confession did not qualify for admission

⁴ The plurality opinion in *United States v. Harris*, 403 U.S. 573, 575-576 (1971), provides further support for the view that statements against penal interest by an accomplice can be reliable under appropriate circumstances. In that case, an informant's statement that he had purchased illegal whiskey from the defendant was used to establish probable cause. A plurality of the Court found the informant's statements reliable, even though the statements consisted of an admission of guilt, made to law enforcement agents, that implicated another in the same criminal activity.

under any recognized hearsay exception. 391 U.S. at 128 n.3.⁵

The Advisory Committee Note to Rule 804(b)(3) expresses the view that *Douglas* and *Bruton* "by no means require that all statements implicating another person be excluded from the category of declarations against interest." Fed. R. Evid. 804 advisory committee note, 28 U.S.C. App. at 790. Instead of a categorical approach, the Committee offered the following framework for evaluating inculpatory statements against penal interest (*ibid.*):

Whether a statement is in fact against interest must be determined from the circumstances of each case. Thus a statement admitting guilt and implicating another person, made while in custody, may well be motivated by a desire to curry favor with the authorities and hence fail to qualify as against interest. * * * On the other hand, the same words spoken under different circumstances, e.g., to an acquaintance, would have no difficulty in qualifying.

That passage confirms that the penal interest determination under Rule 804(b)(3) is to be made on a case-by-case basis and that the Federal Rules of Evidence were not meant to adopt a per se approach to determining whether a statement is genuinely against a declarant's penal interest.⁶

⁵ The Court in *Bruton* did not reach the question whether admitting the confession would offend the Confrontation Clause. 391 U.S. at 128 n.3.

⁶ The drafting and legislative history of Rule 804(b)(3) likewise demonstrates that Congress did not intend to adopt a per se rule of exclusion for accomplice confessions. A preliminary version of the Rule provided that the hearsay exception for statements against interest did "not include a statement or confession offered against the accused in a criminal case, made by a codefendant or other person implicating both himself and the accused." *Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates*, 46

Consistent with those principles, reviewing courts have on numerous occasions upheld the admission of inculpatory statements made to the police by accomplices, but only after satisfying themselves that the statements were genuinely against the declarant's penal interest. For example, in *United States v. Coachman*, 727 F.2d 1293 (D.C. Cir. 1984), the defendant was charged with defrauding the government; an accomplice pleaded guilty prior to trial but refused to testify against the defendant. Applying Rule 804(b)(3), the court of appeals approved the admission against the defendant of "a Secret Service agent's recapitulation of an inculpatory statement made by [the accomplice] after his arrest." 727 F.2d at 1296. The court recognized that "[w]hether a statement is in fact against interest depends upon the circumstances of the particular case." *Ibid.* Although it was "mindful * * * that an in-custody statement which inculcates another as well as the speaker

F.R.D. 161, 378 (1969). When this Court issued the official draft of the Federal Rules of Evidence, however, it omitted that restriction from Rule 804(b)(3), and the accompanying Advisory Committee Note explained that such inculpatory statements could qualify as statements against interest within the meaning of the Rule. See *Rules of Evidence for United States Courts and Magistrates*, 56 F.R.D. 183, 321, 327-328 (1972). Although the House of Representatives sought to bar the admission of inculpatory statements against penal interest, see H.R. Rep. No. 650, 93d Cong., 1st Sess. 16 (1973), the Senate rejected that limitation on the relevant hearsay exception, see S. Rep. No. 1277, 93d Cong., 2d Sess. 21-22 (1974). The Senate's view prevailed in conference, and the Conference Report explained that "[t]he Conferees agree[d] to delete the provision regarding statements by a codefendant, thereby reflecting the general approach in the Rules of Evidence to avoid attempting to codify constitutional evidentiary principles." H.R. Conf. Rep. No. 1597, 93d Cong., 2d Sess. 12 (1974). Contrary to petitioner's argument (Br. 32), that explanation does not suggest an intention to leave the deleted restriction in place; rather, it reflects an intention not to impose any such restriction on the scope of the Rule.

may have been made with a view to currying favor with law-enforcement authorities," *ibid.*, it found no such danger in the accomplice's confession: His "version [of the crime] did not attempt to trivialize his own involvement in the nefarious scheme by shifting responsibility to his cohorts; rather, it frankly disclosed the extent of his own participation without any effort to demonstrate that others were really the ones to blame." *Id.* at 1297. Thus, the court concluded, the rule was satisfied because the accomplice's statement was genuinely against his penal interest. *Ibid.*⁷

Even when they have found that particular statements did not satisfy the requirements of Rule 804(b)(3), the courts of appeals have ordinarily embraced the same basic approach to the Rule. Thus, when the courts have refused to admit evidence as statements against penal interest, it has not been because they have concluded that statements

⁷ See also, e.g., *United States v. Garcia*, 897 F.2d 1413, 1420-1421 (7th Cir. 1990) (co-defendant's post-arrest statement to authorities that he and defendant were both involved in drug conspiracy); *United States v. Koskerides*, 877 F.2d 1129, 1135-1136 (2d Cir. 1989) (statement made in Greece by defendant's father-in-law to FBI agent implicating himself and defendant in violation of Greek and American law); *United States v. Carruth*, 699 F.2d 1017, 1022-1023 (9th Cir. 1983) (statement of defendant's accountant to IRS agent implicating himself and defendant in tax fraud), cert. denied, 464 U.S. 1038 (1984); *United States v. Robinson*, 635 F.2d 363, 364 (5th Cir.) (non-custodial statement by co-defendant to FBI agents implicating both co-defendant and defendant in drug conspiracy; declarant received "no promises" or reason to expect leniency and made no effort "to shift the balance [of culpability] elsewhere"), cert. denied, 452 U.S. 916 (1981); *United States v. Scopo*, 861 F.2d at 348-349 (upholding admission of co-defendant's Fed. R. Crim. P. 11 colloquy that implicated defendant); *United States v. Winley*, 638 F.2d 560, 562 (2d Cir. 1981) (same), cert. denied, 455 U.S. 959 (1982); cf. *Jennings v. Maynard*, 946 F.2d 1502, 1504-1506 (10th Cir. 1991) (upholding admission under Okla. Stat. Ann. tit. 12, § 2804(B)(3) of statement of robbery victim's son-in-law to state police officer that he had told the defendant about the floor plan of the victim's home).

against penal interest by an accomplice are invariably unreliable; instead, it has been because the statements were not sufficiently contrary to the declarant's penal interest, in the circumstances of a particular case, that a reasonable person would not have made them unless he believed them to be true.⁸

In sum, a ruling on the admissibility of evidence under Rule 804(b)(3) calls for an inquiry that depends heavily on the circumstances of the particular case. The determination whether a statement was genuinely against the declarant's penal interest—like the determination whether something is an "excited" utterance, Fed. R. Evid. 803(2), or whether a statement was made "under belief of impending death," Fed. R. Evid. 804(b)(2)—is a "[p]reliminary question[]" concerning admissibility, to be "determined by the [trial] court" under Fed. R. Evid. 104(a). See 4 D. Louisell & C. Mueller, *Federal Evidence* § 489, at 1132-1133 & n.66 (1980) (citing cases). If the proponent of the statement establishes by a preponderance of the evidence (see *Bourjaily v. United States*, 483 U.S. 171, 175-176 (1987)) that a declarant is unavailable and that his statement was truly against his penal interest, the plain

⁸ See, e.g., *United States v. Magna-Olvera*, 917 F.2d 401, 407-409 (9th Cir. 1990) (statements were not sufficiently against declarant's penal interest where they were made in custody after the government suggested that he could halve his prison time for cooperation, and where the statements "trivialized [the declarant's] role in the drug conspiracy"); *United States v. Johnson*, 802 F.2d 1459, 1465 (D.C. Cir. 1986) (holding inadmissible teenager's post-arrest statement trivializing his own role in narcotics offense and implicating an older man and store owner as "the kingpin in a drug operation"); *United States v. Palumbo*, 639 F.2d 123, 127-128 (3d Cir.) (excluding statements based on "the totality of 'circumstances of [this] case'"), cert. denied, 454 U.S. 819 (1981); *United States v. Love*, 592 F.2d 1022, 1025 (8th Cir. 1979) (finding that declarant's statements did not subject her to criminal liability); *United States v. Gonzalez*, 559 F.2d 1271, 1273 (5th Cir. 1977) (declarant had been convicted and given immunity when he made statements at issue).

language of Rule 804(b)(3) makes the statement admissible over a hearsay objection.

B. Harris's Statements To The Interviewing Agent Were Genuinely Against His Penal Interest

The district court's finding (J.A. 51-52) that Harris's statements were against his penal interest within the meaning of Rule 804(b)(3) is fully supported by the record.⁹ When Harris spoke to Agent Walton, he knew that his statements could be used to prosecute him for drug offenses. Nonetheless, during every conversation with Agent Walton, Harris acknowledged his role in the offense. Furthermore, although the cocaine was found in a suitcase bearing someone else's initials, and the rental agreement listed petitioner as an additional driver, Harris made no attempt to deny responsibility for the cocaine. Contrary to petitioner's contention (Br. 26, 43-44), Harris's statements did more than merely confirm what authorities already knew about his involvement in the offense. If Harris had wanted to minimize his role in the offense and shift blame to petitioner, he could easily have claimed that he had no knowledge of the contents of the suitcase in the trunk of the rental car, and that he had consented to a search of the trunk because he had no idea that it contained cocaine.

During his second conversation with Agent Walton, Harris again made no effort to minimize his role in the offense. Harris recounted in detail the role he played in transporting the drugs from Florida to Georgia, again

⁹ It is undisputed that Harris was unavailable to testify and thus that the "unavailability" requirement of Rule 804 was satisfied here. On the government's motion, Harris's trial was severed from petitioner's, and Harris was granted immunity pursuant to 18 U.S.C. 6001 *et seq.* Harris nonetheless refused to testify at petitioner's trial, even after being held in contempt. J.A. 9-15.

subjecting himself to criminal liability for possession and conspiracy to possess cocaine with intent to distribute it. J.A. 38-39. Although Walton had advised Harris that he would report any cooperation to the Assistant United States Attorney, Harris made his statements without any promise of reward for cooperating with the authorities. J.A. 25-26. Moreover, Harris did not pursue the possibility of cooperation either when he spoke with Walton or afterwards.

There is no suggestion in the record that Harris had any motive or desire to implicate petitioner falsely. To the contrary, Harris was reluctant to implicate petitioner, because he believed that petitioner would retaliate against him or his family. J.A. 68. He was concerned that his statements about petitioner would be recorded, and he refused to sign a written statement. J.A. 24-25. And when he subsequently refused to testify against petitioner he was held in contempt of court for his refusal to do so. See J.A. 9-15.¹⁰

The circumstances under which Harris subsequently revised his story provide additional support for the district court's finding that his statements were reliable. Harris initially told Agent Walton that he obtained the cocaine from an unidentified Cuban and had been instructed to leave it in a dumpster. That version of the story concealed petitioner's role in accompanying the cocaine during its transportation and concealed the fact that the cocaine was to be delivered to petitioner. When Agent Walton was leaving the interview area to arrange for a controlled delivery of the cocaine to the dumpster that Harris had described,

¹⁰ Petitioner is mistaken in contending (Br. 27) that Harris's refusal to have his statements recorded and his refusal to repeat them at trial indicated that he was effectively recanting the statements he made to Agent Walton. The much more compelling inference is that Harris was afraid to repeat his statements or have them recorded because he feared retaliation from petitioner.

Harris stood up and blurted out, "I can't let you do that." J.A. 40. He then threw up his hands and said, "that's not true, I can't let you go up there for no reason." *Ibid.* Harris then explained that he was delivering the cocaine to petitioner in Atlanta; that petitioner was driving in front of him and had seen the police stop and search the car; and that a controlled delivery would therefore be impossible. J.A. 40-41.

Under those circumstances, it was highly likely that Harris "would not have made the statement" he made to Agent Walton "unless believing it to be true." Fed. R. Evid. 804(b)(3). When Harris's initial story was going to be put to the test, he spontaneously declared that he had given a false account of the details of the scheme in which he was involved and he provided a revised version. Yet the revised version did not minimize Harris's own role in the drug distribution conspiracy. Like his initial account, the new story had Harris deeply involved in the conspiracy, and it implicated petitioner without seeking to shift responsibility to him. The fact that Harris altered his story when it was on the point of being put to the test strongly indicates that he did not make the statements he did because he wanted to exculpate himself or advance his negotiating position, but that he told the truth because the agents were about to catch him in a falsehood.

This case is therefore different from *Lee v. Illinois*, *supra*, on which petitioner relies heavily. Br. 40-41. As discussed, the declarant in *Lee* inculpated the defendant only after he learned that the defendant had implicated him in a murder case. 476 U.S. at 533, 544. The declarant, moreover, considered becoming a witness for the State at the time he implicated the defendant. *Id.* at 544. The declarant therefore had a powerful motive "either to mitigate the appearance of his own culpability by spreading the blame

or to overstate Lee's involvement in retaliation for her having implicated him." *Ibid.*

In contrast, Harris never attempted to gain anything in return for his confession in this case. Although Agent Walton promised to relay any cooperation to the Assistant United States Attorney, J.A. 25-26, Harris did not seek to engage in any plea bargaining before he spoke to Agent Walton or indicate that he would be willing to testify against petitioner. Nor is there any indication that Harris had a motive to seek revenge against petitioner by implicating him falsely. To the contrary, Harris demonstrated reluctance to name petitioner as the source of the cocaine and set out petitioner's full involvement in the scheme, until it became evident that he had no other practical choice. J.A. 68.

C. The Portions Of Harris's Statements That Inculpated Petitioner Were Properly Admitted Along With The Portions That Inculpated Harris

Petitioner argues (Br. 39-41) that the district court should have held inadmissible the portions of Harris's statements that inculpated petitioner. That argument is contrary to the principles underlying Rule 804(b)(3). The Advisory Committee explained that a "third-party confession * * * may include statements implicating [the accused], and under the general theory of declarations against interest they would be admissible as related statements." Fed. R. Evid. 804 advisory committee note, 28 U.S.C. App. at 790. That observation reflects the common-sense proposition that when the part of a statement implicating the defendant is integral to the parts of the statement that are against the declarant's interest, then both parts of the statement are admissible. See, e.g., *United States v. Lieberman*, 637 F.2d 95, 103 (2d Cir. 1980); *United States v. Barrett*, 539 F.2d 244, 252-253

(1st Cir. 1976). See also, e.g., 2 *McCormick on Evidence* § 319, at 345 (J. Strong ed., 4th ed. 1992) ("When the statement incriminates both the declarant and the accused and is offered by the prosecution against the accused * * * the trend in the federal cases is to admit the entire statement if the two parts are reasonably closely connected.").

Harris's statements implicating petitioner were integrally related to his self-incriminating statements. Harris admitted his involvement in a drug distribution conspiracy that involved his picking up cocaine in Fort Lauderdale and delivering it to petitioner (his co-conspirator) in Atlanta. Harris could not have accurately described the nature of the conspiracy or his role in the offense without implicating petitioner. The references to petitioner were thus so closely linked to the description of the conspiracy that the admission of that part of his statement against interest was entirely appropriate under Rule 804(b)(3). See *United States v. Casamento*, 887 F.2d 1141, 1171 (2d Cir. 1989), cert. denied, 493 U.S. 1081 (1990).

II. STATEMENTS ADMITTED AS DECLARATIONS AGAINST PENAL INTEREST SATISFY THE CONFRONTATION CLAUSE BECAUSE THEY FALL WITHIN A "FIRMLY ROOTED" HEARSAY EXCEPTION

The Confrontation Clause of the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him." Although the Clause expresses a "preference for face-to-face accusation," *Ohio v. Roberts*, 448 U.S. 56, 65 (1980), it does not prohibit the admission of all out-of-court statements. Rather, the Clause countenances the admission of those out-of-court statements that have sufficient "indicia of reliability" to justify dispensing with face-to-face confrontation and cross-examination of the declarant. *Ibid.* Reliability can be

inferred without more, the Court has explained, in a case in which the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded absent a showing that the statement in question carries particularized guarantees of trustworthiness. *Id.* at 66.¹¹ See also *White v. Illinois*, 112 S. Ct. at 743; *Idaho v. Wright*, 497 U.S. at 814-815.

1. In general, if a hearsay exception reflects a long-standing tradition and is widely accepted in current law, it qualifies as a "firmly rooted" exception for purposes of the Confrontation Clause. See, e.g., *White v. Illinois*, 112 S. Ct. at 742 n.8 (state hearsay exception for spontaneous declarations was "firmly rooted" because it is "at least two centuries old" and is "currently recognized under the Federal Rules of Evidence, Rule 803(2), and in nearly four-fifths of the States"); *Bourjaily v. United States*, 483 U.S. at 183 (hearsay exception in Fed. R. Evid. 801(d)(2)(E) for declaration of a co-conspirator is "firmly rooted" because it is "steeped in our jurisprudence" and because such statements "have a long tradition of being outside the compass of the general hearsay exclusion").

This Court has recognized, however, that the category of "firmly rooted" hearsay exceptions is not limited to rules

¹¹ There are several reasons for that distinction. First, "[a]dmission under a firmly rooted hearsay exception satisfies the constitutional requirement of reliability because of the weight accorded longstanding judicial and legislative experience in assessing the trustworthiness of certain types of out-of-court statements." *Idaho v. Wright*, 497 U.S. at 817. Second, the hearsay rules and the Confrontation Clause "are generally designed to protect similar values," and "certain hearsay exceptions rest upon such solid foundations that admission of virtually any evidence within them comports with the 'substance of the constitutional protection.'" *Ohio v. Roberts*, 448 U.S. at 66. Third, admitting evidence pursuant to a "firmly rooted" hearsay exception "responds to the need for certainty in the workaday world of conducting criminal trials." *Ibid.*

of evidence with a long history. "True to the common-law tradition, the process [of accommodating competing interests under the Confrontation Clause] has been gradual, building on past decisions, drawing on new experience, and responding to changing conditions." *Ohio v. Roberts*, 448 U.S. at 64. This Court has therefore been willing to find a hearsay exception "firmly rooted" because of its widespread modern acceptance, without reference to how long ago the exception was first recognized. See *White v. Illinois*, 112 S. Ct. at 742 n.8 (hearsay exception for statements made for purposes of medical diagnosis or treatment is "firmly rooted" because it is "recognized in the Federal Rules of Evidence, Rule 803(4), and is * * * widely accepted among the States"). See also *Idaho v. Wright*, 497 U.S. at 817 (statements within "established hearsay exceptions possess the imprimatur of judicial and legislative experience") (internal quotation marks omitted); *Lee v. Illinois*, 476 U.S. at 552 (Blackmun, J., dissenting).¹²

2. The hearsay exception for statements against penal interest relied on by the courts below is a "firmly rooted" hearsay exception. First, it is found in the Federal Rules of Evidence, which this Court submitted to Congress and Congress enacted into law. In addition, a majority of the States have adopted statutes or rules identical or substantially similar to Rule 804(b)(3),¹³ and courts in several

¹² It is assuredly relevant if a hearsay exception was part of the legal background against which the Confrontation Clause was adopted (see *Mattox v. United States*, 156 U.S. 237, 243 (1895)), and the long-standing character of an evidentiary rule plainly supports the determination that an exception is firmly rooted. See, e.g., *White v. Illinois*, 112 S. Ct. at 742 n.8. But those characteristics are not essential to sustain the classification of a hearsay exception as "firmly rooted."

¹³ See Alaska R. Evid. 804(b)(3); Ariz. R. Evid. 804(b)(3); Cal. Evid. Code § 1230 (West 1966); Colo. R. Evid. 804(b)(3); Del. Unif. R. Evid. 804(b)(3); Fla. Stat. Ann. § 90.804(2)(c) (West Supp. 1994);

other jurisdictions have adopted similar approaches that permit statements against penal interest to be admitted in some circumstances.¹⁴ Although the approach of the Federal Rules of Evidence has not been universally accepted,¹⁵ it nevertheless reflects a strong majority view.¹⁶

Haw. R. Evid. 804(b)(3); Idaho R. Evid. 804(b)(3); Iowa R. Evid. 804(b)(3); Kan. Stat. Ann. § 60-460(j) (Supp. 1992); La. Code Evid. Ann. art. 804(B)(3) (West 1994); Mich. R. Evid. 804(b)(3); Minn. R. Evid. 804(b)(3); Miss. R. Evid. 804(b)(3); Mont. R. Evid. 804(b)(3); Neb. Rev. Stat. § 27-804(2)(c) (1989); N.H. R. Evid. 804(b)(3); N.M. R. Evid. 11-804(b)(4); Ohio R. Evid. 804(b)(3); Okla. Stat. Ann. tit. 12, § 2804(B)(3) (West 1993); Or. Rev. Stat. § 40.465(3)(c) (1989); R.I. R. Evid. 804(b)(3); S.D. Codified Laws Ann. § 19-16-32 (1987); Tenn. R. Evid. 804(b)(3); Utah R. Evid. 804(b)(3); W. Va. R. Evid. 804(b)(3); Wis. R. Evid. 908.045(4); Wyo. R. Evid. 804(b)(3). Several other States allow the admission of statements against penal interest but require all such statements to be corroborated when admitted in a criminal case. N.C. R. Evid. 804(b)(3); Tex. R. Crim. Evid. 803(24); Wash. R. Evid. 804(b)(3). Kentucky requires such corroborating circumstances in civil and criminal cases. Ky. R. Evid. 804(b)(3).

¹⁴ See, e.g., *Laumer v. United States*, 409 A.2d 190, 199 (D.C. 1979) (en banc); *Commonwealth v. Carr*, 369 N.E.2d 970, 972-974 (Mass. 1977); *Agnew v. State*, 446 A.2d 425, 432-433 (Md. Ct. Spec. App. 1982).

¹⁵ A minority of the States have adopted rules that expressly exclude the statements of an accomplice implicating a defendant. See Ark. R. Evid. 804(b)(3); Me. R. Evid. 804(b)(3); Nev. Rev. Stat. Ann. § 51.345 (Michie 1986); N.D. R. Evid. 804(b)(3); Vt. R. Evid. 804(b)(3). In addition, courts in several other States have shown reluctance to admit such statements. See, e.g., *Crowder v. State*, 227 S.E.2d 230, 239 (Ga. 1976). Some States categorically refuse to allow statements against penal interest to be admitted against an accused. See, e.g., *Flowers v. State*, 586 So. 2d 978, 987 (Ala. Crim. App.), cert. denied, 596 So. 2d 954 (Ala. 1991), cert. denied, 112 S. Ct. 1995 (1992); *State v. Leisure*, 838 S.W.2d 49, 57 (Mo. Ct. App. 1992).

¹⁶ Petitioner contends (Br. 20 n.5) that in *State v. Hansen*, 312 N.W.2d 96 (Minn. 1981), the Minnesota Supreme Court construed a state rule similar to Fed. R. Evid. 804(b)(3) to exclude inculpatory

Accordingly, it is not surprising that most of the courts of appeals to have considered the issue have held that the hearsay exception for statements against penal interest is "firmly rooted."¹⁷

Petitioner argues (Br. 17-18) that the hearsay exception for declarations against penal interest is too recent in origin to be "firmly rooted." As we have noted, however, a hearsay exception may be firmly rooted because of its widespread acceptance in contemporary law. See *White v. Illinois*, 112 S. Ct. at 742 n.8 (statements made for the

statements by accomplices. That decision, however, merely held that a statement made under promise of a reduced charge was not against the declarant's penal interest. See 312 N.W.2d at 100-101. He also claims (Br. 20 n.5) that *State v. Abourezk*, 359 N.W.2d 137 (S.D. 1984), generally excludes inculpatory admissions of accomplices under a similar rule. That decision, however, also turned on the specific circumstances surrounding the declarant's statement. *Id.* at 142. Petitioner likewise errs in suggesting (Br. 20 n.5) that California refuses to allow the admission of post-arrest inculpatory statements against penal interest. See *People v. Gordon*, 792 P.2d 251, 265-269 (Cal. 1990), cert. denied, 499 U.S. 913 (1991).

¹⁷ See, e.g., *United States v. Seeley*, 892 F.2d 1, 2 (1st Cir. 1989); *United States v. Katsougrakis*, 715 F.2d 769, 776 (2d Cir. 1983), cert. denied, 464 U.S. 1040 (1984); *United States v. York*, 933 F.2d 1343, 1363 (7th Cir.), cert. denied, 112 S. Ct. 321 (1991); *Berrisford v. Wood*, 826 F.2d 747, 751 (8th Cir. 1987), cert. denied, 484 U.S. 1016 (1988); *Jennings v. Maynard*, 946 F.2d 1502, 1505-1506 (10th Cir. 1991); *United States v. Taggart*, 944 F.2d 837, 840 (11th Cir. 1991). But cf. *Morrison v. Duckworth*, 929 F.2d 1180, 1181 n.2 (7th Cir. 1991) (indicating that statements against penal interest are not admissible if they seek to "cast blame on" others); *United States v. Bakhtiar*, 994 F.2d 970, 977-978 (2d Cir.) (noting that the court of appeals had "previously held that the penal interest exception is firmly rooted" but acknowledging that "[s]ome recent cases cast some doubt on this conclusion, * * * and the Supreme Court has not addressed the question"), cert. denied, 114 S. Ct. 554 (1993). Only the Fifth Circuit has squarely held that the exception is not firmly rooted. See *United States v. Flores*, 985 F.2d 770 (1993).

purpose of medical diagnosis). In any event, the origins of the hearsay exception for declarations against penal interest go back much farther than petitioner suggests.

Courts in England began to admit statements against a declarant's financial or pecuniary interest "shortly after the hearsay rule was established." 5 J. Wigmore, *supra*, § 1476, at 350. Prior to the mid-19th century, English courts also admitted statements against a declarant's penal interest. *Id.* at 350-351 & n.8 (collecting authorities). See also Note, 13 Va. L. Rev. 41, 42 & n.5 (1927).

By the early 1800s, the trend was in favor of admitting declarations against interest in general. See 5 J. Wigmore, *supra*, § 1476, at 350. In 1844, however, the House of Lords decided the *Sussex Peerage Case*, 11 Cl. & F. 85, 110, in which

a backward step was taken and an arbitrary limit put upon the rule. It was held to exclude the statement of a fact subjecting the declarant to a *criminal liability*, and to be confined to statements of *facts against either pecuniary or proprietary interest*. Thenceforward this rule was accepted in England, although it was plainly a novelty at the time of its inception; for in several rulings up to that time statements of criminal facts had been received.

5 J. Wigmore, *supra*, § 1476, at 351 (footnotes omitted).

The *Sussex Peerage Case* was widely followed in this country in the second half of the 19th century. See 5 J. Wigmore, *supra*, § 1476, at 352 n.9; Morgan, *Declarations Against Interest*, 5 Vand. L. Rev. 451, 473 (1952). Commentators, however, "almost universally" condemned the distinction drawn between statements against penal interest and the other kinds of statements against interest, see Note, *Declarations Against Penal Interest: Standards of Admissibility Under an Emerging*

Majority Rule, 56 B.U. L. Rev. 148, 152 (1976),¹⁸ and courts "demonstrated striking ingenuity" in discovering ways to bring statements against penal interest within the hearsay exception for statements against pecuniary or proprietary interest. Fed. R. Evid. 804 advisory committee note, 28 U.S.C. App. at 789; see, e.g., Jefferson, *Declarations Against Interest: An Exception to the Hearsay Rule*, 58 Harv. L. Rev. 1, 40 & nn.94-96 (1944); Morgan, 5 Vand. L. Rev. at 474-475; *Aetna Life Ins. Co. v. Strauch*, 67 P.2d 452, 455 (Okla. 1937) (admitting declarant's confession to murder on the ground that it would have prevented him from recovering insurance on the victim), *overruled by Howard v. Jessup*, 519 P.2d 913, 917 (Okla. 1973) (recognizing hearsay exception for statements against penal interest); *Weber v. Chicago, R.I. & P. Ry.*, 151 N.W. 852, 864 (Iowa 1915) (declarations were "against [the declarant's] pecuniary interest, for they were of such a nature as to constitute the basis of an action against him for damages as well as exposing him to criminal prosecution").

In *Donnelly v. United States*, 228 U.S. 243 (1913), this Court followed the rule then prevailing in the States and held that the federal hearsay exception for statements against interest did not extend to statements against penal interest. *Id.* at 272-277. The Court sustained the decision not to admit the declarant's out-of-court confession to the murder for which the defendant had been convicted. More influential than the majority opinion in the long run,

¹⁸ See, e.g., Comment, 1 Cal. L. Rev. 475, 476 (1913); Comment, 9 Cornell L. Q. 57, 59 (1924); Recent Case, 37 Harv. L. Rev. 156, 156-157 (1924); Comment, 10 Va. L. Rev. 83, 84 (1924); Jefferson, *Declarations Against Interest: An Exception to the Hearsay Rule*, 58 Harv. L. Rev. 1, 40 (1944); Morgan, 5 Vand. L. Rev. at 463; 2 McCormick on Evidence, *supra*, § 318, at 340.

however, was Justice Holmes' dissent, which reasoned (*id.* at 277-278):

The rules of evidence in the main are based on experience, logic and common sense, less hampered by history than some parts of the substantive law. There is no decision by this court against the admissibility of such a confession; the English cases since the separation of the two countries do not bind us; the exception to the hearsay rule in the case of declarations against interest is well known; no other statement is so much against interest as a confession of murder, it is far more calculated to convince than dying declarations, which would be let in to hang a man.

Following Justice Holmes' reasoning in *Donnelly*, several States subsequently recognized hearsay exceptions for statements against penal interest.¹⁹ By 1976, no fewer than 21 States allowed the admission of statements against penal interest. See Note, 56 B.U. L. Rev. at 149 n.5. And by the time the Federal Rules of Evidence were being proposed and adopted, Members of this Court had already begun to pull back from *Donnelly's* broad reasoning in a series of cases raising similar issues. See *Dutton v. Evans*, 400 U.S. 74, 76-81, 89 (1970) (plurality opinion) (allowing admission of post-conspiracy statement of co-conspirator under Georgia hearsay exception; noting that there were sufficient "indicia of reliability" to satisfy the Confrontation Clause because the statement "was spontaneous, and it was against [the declarant's] penal interest to make it"); *United States v. Harris*, 403 U.S. 573, 583-584 (1971)

¹⁹ Most, but not all, of those decisions, like *Donnelly*, involved statements exculpating a criminal defendant, such as third-party confessions. See, e.g., *Hines v. Commonwealth*, 117 S.E. 843, 847-849 (Va. 1923); *Osborne v. Purdome*, 250 S.W.2d 159, 162-163 (Mo. 1952); *People v. Spriggs*, 389 P.2d 377, 378-381 (Cal. 1964) (Traynor, J.).

(plurality opinion) (noting that *Donnelly* “has been widely criticized * * * and has been partially rejected in Rule 804 of the Proposed Rules of Evidence”);²⁰ *United States v. Matlock*, 415 U.S. 164, 176 (1974) (declarant’s out-of-court statements “were against her penal interest and they carried their own indicia of reliability”). See also *Lee v. Illinois*, 476 U.S. at 551 (Blackmun, J., dissenting) (“The hearsay exception for declarations against [penal] interest is firmly established.”).²¹

²⁰ The plurality in *Harris* added (403 U.S. at 583-584):

Common sense in the important daily affairs of life would induce a prudent and disinterested observer to credit these statements. People do not lightly admit a crime and place critical evidence in the hands of the police in the form of their own admissions. Admissions of crime, like admissions against proprietary interests, carry their own indicia of credibility—sufficient at least to support a finding of probable cause to search. That the informant may be paid or promised a “break” does not eliminate the residual risk and opprobrium of having admitted criminal conduct.

²¹ *Douglas v. Alabama*, *supra*, and *Bruton v. United States*, *supra*, are not to the contrary. As discussed, the out-of-court statement in *Douglas* was not against the declarant’s penal interest because it sought to establish his co-defendant as the trigger man in a shooting. In *Bruton*, the government conceded that the confession of a co-defendant was inadmissible against Bruton, and the only question in the case was whether the jury was able to follow the trial court’s instruction to disregard that confession as to Bruton. The holdings of those decisions do not foreclose the determination that statements against penal interest may be admitted under an exception to the hearsay rule. See, e.g., Fed. R. Evid. 804 advisory committee note, 28 U.S.C. App. at 790; *Lee v. Illinois*, 476 U.S. at 552 n.5 (Blackmun, J., dissenting); *Cruz v. New York*, 481 U.S. 186, 192-193 (1987).

Petitioner argues (Br. 15-16) that in *Lee v. Illinois*, *supra*, this Court held that the hearsay exception for declarations against penal interest is not firmly rooted. The Court in *Lee*, however, merely observed: “We reject [the State’s] categorization of the hearsay involved in this case as a simple ‘declaration against penal interest.’ That concept

Petitioner does not dispute that the other branch of the hearsay exception for statements against interest—statements against pecuniary and proprietary interest—is a “firmly rooted” exception, as this Court has used that term. If that is so, however, it is difficult to understand why the result should be different in the case of the “penal interest” branch of the exception. The central requirement of both branches is the same—that the statement must be sufficiently against the declarant’s interest that he would not have made it if he did not believe that it was true. That inquiry is exactly the same for one kind of statement against interest as for another. The only significant difference between the two branches, for purposes of determining how “firmly rooted” they are, is that two sharply criticized decisions from 150 and 80 years ago refused to recognize statements against penal interest as falling within the scope of the exception. Since the influence of those decisions has largely abated, it does not make sense to treat one branch of the “statements-against-interest” exception as firmly rooted and the other branch not.

In sum, the exception for declarations against penal interest is a firmly rooted hearsay exception, as this Court has used that term. First, it is widely accepted in contemporary law, having been embraced in the Federal Rules of Evidence and a majority of the States. Second, although

defines too large a class for meaningful Confrontation Clause analysis.” 476 U.S. at 544 n.5. Unlike the broad category referred to by the Court, the class of statements at issue here is narrowly defined as statements that “so far tend[] to subject the declarant to * * * criminal liability * * * that a reasonable person in the declarant’s position would not have made the statement unless believing it to be true.” Fed. R. Evid. 804(b)(3). The footnote in *Lee* on which petitioner relies cannot be taken as holding that statements satisfying the requirements of that Rule nonetheless must be excluded from admission under the Confrontation Clause.

there was a period of time during the last century in which most courts formally refused to recognize a common law hearsay exception for statements against penal interest, there were many cases even during that period that effectively recognized the penal interest exception by recharacterizing declarations against penal interest as statements against pecuniary interest. And third, ever since Justice Holmes' dissent in *Donnelly* in 1913, the trend in the law has favored recognizing a hearsay exception for statements against penal interest.

III. NEITHER RULE 804(b)(3) NOR THE CONFRONTATION CLAUSE REQUIRES CORROBORATION OF A STATEMENT AGAINST INTEREST

Petitioner contends (Br. 45-46) that before the government could introduce Harris's hearsay declarations, it was required to establish particularized guarantees of trustworthiness under this Court's decision in *Idaho v. Wright*, *supra*. That contention is contradicted by both the text of Rule 804(b)(3) and the principles reflected in this Court's Confrontation Clause decisions.

First, there is no basis for that requirement in the text of Rule 804(b)(3) or the accompanying Advisory Committee Note. In fact, Rule 804(b)(3) specifically provides that a statement against penal interest "offered to *exculpate* the accused" is not admissible unless "corroborating circumstances clearly indicate the trustworthiness of the statement" (emphasis added). There is no corresponding requirement applicable to statements against interest offered to *inculpate* the accused, even though Rule 804(b)(3) clearly contemplates that such statements will be admissible in appropriate circumstances. See Fed. R. Evid. 804 advisory committee note, 28 U.S.C. App. at 790. The disparate treatment of exculpatory and inculpatory statements

against penal interest carries the clear negative implication that inculpatory statements require no separate showing of "corroborating circumstances."

Second, the Confrontation Clause does not require proof of corroboration as a prerequisite to admission. As discussed, this Court in *Ohio v. Roberts*, *supra*, drew a sharp dichotomy for Confrontation Clause purposes between statements admitted pursuant to a "firmly rooted" hearsay exception and those not admitted pursuant to such an exception. Under that framework, "[r]eliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness." 448 U.S. at 66. This Court has adhered to that distinction in subsequent decisions, see, e.g., *White v. Illinois*, *supra*; *Idaho v. Wright*, *supra*, and petitioner has offered no basis for reconsidering that approach here. Because the hearsay exception contained in Rule 804(b)(3) is "firmly rooted" in our jurisprudence, the Confrontation Clause does not impose any special showing of reliability, through corroborating circumstances.

Finally, even if the Confrontation Clause required an independent showing of reliability to justify admission of statements against penal interest, that showing would be made in every case in which a statement is properly held admissible under Rule 804(b)(3). The very premise of admitting evidence under Rule 804(b)(3) is that no "reasonable person" would make a statement qualifying under the Rule, "unless believing it to be true." Fed. R. Evid. 804(b)(3). Thus, as we have noted above, the test provided by the Rule itself requires that the statement be made under circumstances that ensure its reliability. For that reason, the Confrontation Clause concerns are satisfied, if the Rule is properly applied, with respect to any statement

that is found to be genuinely against the declarant's penal interest. In that regard, the rule authorizing the admission of statements against interest enjoys the same guarantee of reliability as other well-established hearsay exceptions, such as the "business records" exception, the "excited utterance" exception, and the exception for declarations of co-conspirators in furtherance of the conspiracy.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

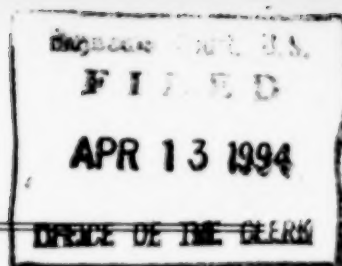
JO ANN HARRIS
Assistant Attorney General

JOHN F. MANNING
Assistant to the Solicitor General

DAVID S. KRIS
Attorney

MARCH 1994

(8)
No. 93-5256



In The
Supreme Court of the United States
October Term, 1993

FREDEL WILLIAMSON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
for The Eleventh Circuit

REPLY BRIEF FOR PETITIONER

BENJAMIN S. WAXMAN
ROBBINS, TUNKEY, ROSS, AMSEL &
RABEN, P.A.
2250 Southwest Third Avenue
Miami, Florida 33129
(305) 858-9550
Counsel for Petitioner

2719

QUESTIONS PRESENTED

I. Whether a post-arrest confession by an accomplice implicating a defendant, offered as an admission against penal interest of an unavailable declarant under Federal Rule of Evidence 804(b)(3), bears adequate indicia of reliability to render it admissible under Rule 804(b)(3) and the Sixth Amendment Confrontation Clause?

II. Whether a post-arrest confession by an accomplice implicating a defendant, offered as an admission against penal interest of an unavailable declarant under Federal Rule of Evidence 804(b)(3), constitutes a firmly rooted hearsay exception rendering it presumptively reliable and not subject to further analysis under the Sixth Amendment Confrontation Clause?

III. Whether 804(b)(3)'s requirement that a statement must be corroborated by circumstances clearly indicating its trustworthiness, is subject to the further requirement of *Idaho v. Wright*, 497 U.S. 805 (1990), that the only circumstances that can be considered are those surrounding the making of the statement?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
ARGUMENTS AND CITATIONS OF AUTHORITY..	1
I. A POST-ARREST CONFESSION OF AN UNAVAILABLE ALLEGED ACCOMPLICE WHICH INCRIMINATES A CRIMINAL DEFENDANT AND WAS ELICITED THROUGH CUSTODIAL INTERROGATION IS INHERENTLY UNRELIABLE AND ITS INTRODUCTION INTO EVIDENCE AT THE DEFENDANT'S SEPARATE TRIAL NECESSARILY VIOLATES THE SIXTH AMENDMENT	1
II. HARRIS'S POST-ARREST STATEMENTS IMPLICATING WILLIAMSON DID NOT MEET THE REASONABLE PERSON STANDARD OF RULE 804(B)(3) OR OTHERWISE BEAR ADEQUATE INDICIA OF RELIABILITY TO RENDER THEM ADMISSIBLE UNDER THE SIXTH AMENDMENT CONFRONTATION CLAUSE.....	8
III. A POST-ARREST CONFESSION OF AN ALLEGED ACCOMPLICE WHICH INCRIMINATES A CRIMINAL DEFENDANT DOES NOT FALL WITHIN A FIRMLY ROOTED HEARSAY EXCEPTION.....	14

TABLE OF AUTHORITIES

	Page
CASES	
<i>Berrisford v. Wood</i> , 826 F.2d 747 (8th Cir. 1987), <i>cert. denied</i> , 484 U.S. 1016 (1988).....	16
<i>Bruton v. United States</i> , 391 U.S. 123 (1968).....	18
<i>Chambers v. Mississippi</i> , 410 U.S. 284 (1973).....	17
<i>Coy v. Iowa</i> , 487 U.S. 1012 (1988).....	2
<i>Cruz v. New York</i> , 481 U.S. 186 (1987)	18
<i>Davis v. Alaska</i> , 415 U.S. 308 (1974)	2
<i>Delaware v. Van Arsdall</i> , 475 U.S. 673 (1986)	2
<i>Donnelly v. United States</i> , 228 U.S. 243 (1913)	17
<i>Douglas v. Alabama</i> , 380 U.S. 415 (1965).....	18
<i>Idaho v. Wright</i> , 497 U.S. 805 (1990)	15, 19
<i>Krulewitch v. United States</i> , 336 U.S. 440 (1949)	7
<i>Lee v. Illinois</i> , 476 U.S. 530, 106 S.Ct. 2056 (1986)... <i>passim</i>	
<i>Ohio v. Roberts</i> , 448 U.S. 56 (1980).....	19
<i>Olden v. Kentucky</i> , 488 U.S. 227 (1988).....	2
<i>Olson v. Greene</i> , 668 F.2d 421 (8th Cir.), <i>cert. denied</i> , 456 U.S. 1009 (1982).....	16
<i>People v. Brensic</i> , 70 N.Y.2d 9, 517 N.Y.S.2d 120, 509 N.E.2d 1226 (1987)	5
<i>People v. Gordon</i> , 50 Cal.3d 1223, 270 Cal. Rptr. 451, 792 P.2d 251 (1990), <i>cert. denied</i> , 499 U.S. 913 (1991)	5

TABLE OF AUTHORITIES – Continued

Page

<i>People v. Leach</i> , 15 Cal.3d 419, 124 Cal.Rptr. 752, 541 P.2d 296 (1975), cert. denied, 424 U.S. 916 (1976)	5
<i>People v. Poole</i> , 444 Mich. 151, 506 N.W.2d 505 (1993)	3
<i>People v. Watkins</i> , 438 Mich. 627, 475 N.W.2d 727 (1991), cert. denied, 112 S. Ct. 933 (1992)	3
<i>Roberts v. Russell</i> , 392 U.S. 293 (1968)	2
<i>State v. Allen</i> , 139 N.J.Super. 285, 353 A.2d 546 (1976)	5
<i>State v. Self</i> , 88 N.M. 37, 536 P.2d 1093 (1975)	5
<i>Sussex Peerage Case</i> , 11 Cl. & F.85, 8 Eng.Rep. 1034 (1844)	17
<i>United States v. Alvarez</i> , 584 F.2d 694 (5th Cir. 1978)	8
<i>United States v. Bailey</i> , 581 F.2d 341 (3d Cir. 1978)	5
<i>United States v. Barrett</i> , 539 F.2d 244 (1st Cir. 1976)	7
<i>United States v. Boyce</i> , 849 F.2d 833 (3d Cir. 1988)	8
<i>United States v. Casamento</i> , 887 F.2d 1141 (2d Cir. 1989), cert. denied, 493 U.S. 1081 (1990)	8
<i>United States v. Flores</i> , 985 F.2d 770 (5th Cir. 1993)	5
<i>United States v. Lieberman</i> , 637 F.2d 95 (2d Cir. 1980)	7
<i>United States v. Lilley</i> , 581 F.2d 182 (8th Cir. 1978) ..	5, 17
<i>United States v. Love</i> , 592 F.2d 1022 (8th Cir. 1979)	17
<i>United States v. Palumbo</i> , 639 F.2d 123 (3d Cir. 1981)	5

TABLE OF AUTHORITIES – Continued

Page

<i>United States v. Riley</i> , 657 F.2d 1377 (8th Cir. 1981), cert. denied, 459 U.S. 111 (1983)	5, 16
<i>United States v. Sarmiento-Perez</i> , 633 F.2d 1092 (5th Cir. 1981)	5
STATUTES, RULES, AND CONSTITUTIONAL PROVISIONS	
Federal Rule of Criminal Procedure 35(b)	11
Federal Rule of Evidence 804(b)(3)	passim
Idaho Rules of Evidence 803(24)	15
United States Code Title 18 § 3553(e)	11
United States Constitution	
Sixth Amendment Confrontation Clause	passim
United States Sentencing Guidelines	
§ 2D1.1, Application Note 16	10
§ 3B1.2	11
OTHER AUTHORITIES	
Beaver and McCleary, <i>Inculpatory Statements Against Penal Interest: State v. Paris Goes Too Far</i> , 8 U of Puget Sound L.Rev. 25 (1984)	6
Bergeisn, <i>Federal Rule of Evidence and Inculpatory Statements Against Penal Interest</i> , 66 Calif.L.Rev. 1189 (1978)	6
Davenport, <i>The Confrontation Clause and the Co-Conspirator Exception in Criminal Prosecutions: A Functional Analysis</i> , 85 Harv.L.Rev. 1378 (1972)	6
E. CLEARY, MCCORMICK ON EVIDENCE § 279 (2d ed. 1972)	7

TABLE OF AUTHORITIES – Continued

	Page
E. CLEARY, MCCORMICK ON EVIDENCE § 279 (3d ed. 1984).....	5, 7
H.R.REP.NO. 650, 93d Cong., 2d Sess., reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 7075.....	1
Jefferson, <i>Declaration Against Interest: An Exception to the Hearsay Rule</i> , 58 Harv.L.Rev. 1 (1944)	6
2 MCCORMICK ON EVIDENCE § 319 (J. Strong 4th ed. 1992).....	6
Note, <i>Inculpatory Declarations Against Penal Interest and the Co-conspirator Rule Under the Federal Rules of Evidence</i> , 56 Ind.L.J. 151 (1980)	6
Note, <i>Inculpatory Statements Against Penal Interest and the Confrontation Clause</i> , 83 Colum.L.Rev. 159 (1983).....	6
Notes of Advisory Committee on 1972 Proposed Rules, West's Federal Criminal Code and Rules (1993)	6
S.REP.NO. 1277, 93d Cong., 2d Sess., reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 7051.....	1
4 J. WEINSTEIN AND M. BERGER, WEINSTEIN'S EVIDENCE ¶ 804(b)(3)[03] (1990).....	5
5 J. WIGMORE, EVIDENCE § 1465 (Chadbourn rev. 1974).....	4

ARGUMENTS AND CITATIONS OF AUTHORITY

I. A POST-ARREST CONFESSION OF AN UNAVAILABLE ALLEGED ACCOMPLICE WHICH INCRIMINATES A CRIMINAL DEFENDANT AND WAS ELICITED THROUGH CUSTODIAL INTERROGATION IS INHERENTLY UNRELIABLE AND ITS INTRODUCTION INTO EVIDENCE AT THE DEFENDANT'S SEPARATE TRIAL NECESSARILY VIOLATES THE SIXTH AMENDMENT.

The government argues that "[t]here is nothing in the text or history of Rule 804(b)(3) that requires the categorical exclusion of [custodial confessions of accomplices which incriminate criminal defendants]." Gov.Br. 10. The government is wrong. As Petitioner pointed out in his initial brief, early drafts of the rule excluded statements or confessions offered against an accused in a criminal case, made by a codefendant or other person implicating both himself and the accused. H.R.REP.NO. 650, 93d Cong., 2d Sess., reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 7075, 7087. This exclusion was eliminated later only because it was deemed unnecessary to codify prevailing constitutional evidentiary principles. S.REP.NO. 1277, 93d Cong., 2d Sess., reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 7051, 7068. Pet.Br. 17-18. Thus, the history of the rule supports a categorical exclusion.

More importantly, the history and function of the Confrontation Clause and the courts' experience in considering this type of statement strongly support a per se rule of exclusion. Although the government recognizes that this Court has consistently expressed grave doubt about the trustworthiness of these statements and has, consequently, repeatedly excluded them, Pet.Br. 31, it argues that because this Court, until now, has never held that these statements are per se inadmissible, it should not do so now. Gov.Br. 13. This Court's uniform experience with and treatment of these statements now warrant

such a rule. Even cases which have ultimately admitted statements falling within this category have recognized them to be uniquely and especially suspect. The courts have identified the various factors – made in the coercive setting of police custody, in response to interrogation, under circumstances in which the declarant has a strong incentive to shift or spread blame, curry favor, avenge himself, or divert attention to another, not under oath – which, in accordance with human experience, dramatically undermine the trustworthiness of these statements. As this Court stated in *Roberts v. Russell*, 392 U.S. 293, 295 (1968), which held that the rule of *Bruton* is to be applied retroactively, “the constitutional error [of allowing the factfinder to consider such a statement] presents a serious risk that the issue of guilt or innocence may not have been reliably determined.” These statements are typically the linchpin to the government’s case. Permitting the lower courts the discretion to admit these statements presents an unreasonable risk that a defendant will be convicted based on untrustworthy hearsay.

By permitting the courts to admit these inherently untrustworthy hearsay statements, a defendant’s right to confront the declarant and demonstrate his lack of credibility is forfeited when his need for that right is paramount. This Court has held that a defendant’s confrontation rights are violated when, though some cross-examination is permitted, it is restricted to such a degree as to deprive the defendant an adequate opportunity to fully develop a defense or demonstrate bias. E.g., *Olden v. Kentucky*, 488 U.S. 227 (1988); *Delaware v. Van Arsdall*, 475 U.S. 673, 678-80 (1986); *Davis v. Alaska*, 415 U.S. 308, 315-18 (1974). This Court has held that the mere denial of a face-to-face confrontation of the witness against a defendant, even where cross-examination is fully afforded, may violate the Confrontation Clause. *Coy v. Iowa*, 487 U.S. 1012 (1988). In our situation, where admission of the declarant’s hearsay statement would

result in a denial of *all* cross-examination regarding the most important witness, a per se rule of exclusion is demanded.

A per se rule of exclusion is warranted because post-arrest confessions of accomplices which implicate defendants categorically fail to satisfy the rationale underlying the declaration against penal interest exception. In the case *People v. Watkins*, 438 Mich. 627, 475 N.W.2d 727 (1991), *cert. denied*, 112 S. Ct. 933 (1992), Chief Justice Cavanagh of the Michigan Supreme Court explored this hybrid issue.¹ Chief Justice Cavanagh defined the “carry-over” rule and its rationale as follows:

[D]iscrete assertions within a broader statement are viewed as against interest and therefore admissible – even though they, specifically, are *not* in fact against the interest of the declarant, and may even *favor* the interest of the declarant – on the theory that the trustworthiness of *other* assertions within the broader statement (which are concededly against the declarant’s interest) “carries over” and permeates the entire statement with a sort of aura of trustworthiness.

Id. at 633-34 (emphasis in original). Chief Justice Cavanagh noted that Dean Wigmore’s treatise appears to

¹ *Amicus* Wayne County, Michigan, apparently overlooked *Watkins*. Instead it cites *People v. Poole*, 444 Mich. 151, 506 N.W.2d 505 (1993), *amicus* at 45-46, in which the court held that the declarant’s statements were admissible against the defendant. The court in *Poole* specifically distinguished *Watkins* because unlike the custodial statements made in response to police interrogation in *Watkins*, *id.*, 438 Mich. at 706, the statements in *Poole* were spontaneously made to a non-agent acquaintance. Any reasonable assessment of the portion of Harris’s statement implicating Williamson against the factors identified in *Poole*, *amicus* at 45-46, compels a conclusion that Harris’s statement, and any similar statement, would *not* satisfy the Confrontation Clause.

support this rule. *Id.* at 634 (quoting 5 J. WIGMORE, EVIDENCE § 1465 at 339 (Chadbourn rev. 1974)). Wigmore reasoned that these other statements are admissible because they were made "while the declarant was in the trustworthy condition of mind which permitted him to state what was against his interest." *Id.* at 635 (quoting WIGMORE at 341)). Chief Justice Cavanagh went on to point out that this is not the rationale which arguably renders a statement against interest trustworthy. Instead, "as Wigmore himself states, '[t]he basis of the exception is the principle of experience that a statement asserting a fact distinctly against one's interest is unlikely to be deliberately false or heedlessly incorrect. . . .' *Id.*, § 1457, p. 329." *Id.* Thus, "[s]uch a statement . . . has a guarantee of trustworthiness only insofar as the truth-telling stimulus of the declarant is operative; that is only insofar as the statement or portions of the statement, is against the declarant's interest." *Id.* at 636 (quotation omitted). As Chief Justice Cavanagh further explained:

It would defy logic and common sense, however, to suppose that the motive for truthfulness presumed to underlie a discrete, specific assertion against interest possesses any such permeating influence, or could somehow cloak all collateral assertions with an equivalent aura of reliability. The presumed trustworthiness of a statement against interest derives not from the circumstances in which the statement is made, or from the general mental condition of the declarant, but only from the specific factual character of the statement itself. The statement is trustworthy *precisely*, and *only*, to the extent that it is, in fact, against the interests of the declarant.

Id. at 637-38 (footnote omitted).²

² Chief Justice Cavanagh went on to demonstrate how Wigmore, himself, in several passages of his treatise, appears to

The rationale underlying Chief Justice Cavanagh's opinion is compelling. As he points out, "[t]he caselaw rejecting the carry-over rule is both ample and persuasive." *Id.* at 639. The rule has been persuasively rejected by state courts, e.g., *People v. Leach*, 15 Cal.3d 419, 441, 124 Cal.Rptr. 752, 541 P.2d 296, 308-11 (1975), *cert. denied*, 424 U.S. 916 (1976)³; *State v. Allen*, 139 N.J.Super. 285, 288, 353 A.2d 546, 548 (1976); *State v. Self*, 88 N.M. 37, 536 P.2d 1093, 1097-98 (1975); *People v. Brensic*, 70 N.Y.2d 9, 15-16, 517 N.Y.S.2d 120, 509 N.E.2d 1226, 1228-29 (1987) (where statement offered to incriminate defendant, penal interest compromised must be "of sufficient magnitude or consequence to the declarant to all but rule out any motive to falsify"), and federal courts. E.g. *United States v. Flores*, 985 F.2d 770, 780-83 (5th Cir. 1993); *United States v. Sarmiento-Perez*, 633 F.2d 1092, 1101-02 (5th Cir. 1981); *United States v. Lilley*, 581 F.2d 182, 188 (8th Cir. 1978); *see, e.g., United States v. Riley*, 657 F.2d 1377, 1384-85 (8th Cir. 1981), *cert. denied*, 459 U.S. 111 (1983); *United States v. Palumbo*, 639 F.2d 123, 127-28 (3d Cir. 1981); *United States v. Bailey*, 581 F.2d 341, 345-46 n. 4 (3d Cir. 1978). Moreover, both Judge Weinstein and Dean McCormick, in their treatises, have taken "an almost absolute position against the admission of inculpatory hearsay statements in accomplice confessions." *Id.* at 643-44 (quoting 4 J. WEINSTEIN AND M. BERGER, WEINSTEIN'S EVIDENCE ¶ 804(b)(3)[03] at 804-150 (1990)), 645 (quoting E. CLEARY, MCCORMICK ON

have rejected the rationale underlying the supposed carry-over rule. *Id.* at 638.

³ The case *People v. Gorden*, 50 Cal.3d 1223, 270 Cal. Rptr. 451, 792 P.2d 251 (1990), *cert. denied*, 499 U.S. 913 (1991), cited by the government, Gov.Br. 12, 28, appears to be wrongly decided. It can neither be squared with California's rejection of the carry-over rule in *Leach* nor the reasoning and rule of this Court's in *Lee*.

EVIDENCE § 279 at 825-26 (3d ed. 1984)). Numerous commentators have criticized the approach of the carry over rule.⁴ Finally, as Chief Justice Cavanagh noted, it would appear that this Court, too, has rejected it. *Lee v. Illinois*, 476 U.S. 530, 545, 106 S.Ct. 2056, 2064 (1986). To the extent there is any doubt, this Court should conclusively reject this poorly reasoned, unconstitutional rule today.

The government argues that the portions of Harris's statements that inculpated Petitioner were properly admitted along with the portions that inculpated Harris. Gov.Br. 23-24. Its reliance on the Advisory Committee Notes to Rule 804 is misplaced. The Advisory Committee Notes' reference to the potential admissibility of third party confessions implicating a defendant is qualified later in the same note to indicate that a statement such as Harris's, "admitting guilt and implicating another person, made while in custody," and likely motivated by a desire to curry favor with the authorities, should be excluded.

The government cites 2 MCCORMICK ON EVIDENCE § 319 at 345 (J. Strong 4th ed. 1992) for the proposition: "When the statement incriminates both the declarant and the accused and is offered by the prosecution against the accused . . . the trend in the federal courts is to admit the

⁴ See, e.g., Beaver and McCleary, *Inculpatory Statements Against Penal Interest: State v. Paris Goes Too Far*, 8 U of Puget Sound L.Rev. 25 (1984); Bergeisn, *Federal Rule of Evidence and Inculpatory Statements Against Penal Interest*, 66 Calif.L.Rev. 1189, 1207-17 (1978); Davenport, *The Confrontation Clause and the Co-Conspirator Exception in Criminal Prosecutions: A Functional Analysis*, 85 Harv.L.Rev. 1378, 1394-98 (1972); Note, *Inculpatory Declarations Against Penal Interest and the Co-conspirator Rule Under the Federal Rules of Evidence*, 56 Ind.L.J. 151, 168-71 (1980); Note, *Inculpatory Statements Against Penal Interest and the Confrontation Clause*, 83 Colum.L.Rev. 159, 163-64 (1983); Jefferson, *Declaration Against Interest: An Exception to the Hearsay Rule*, 58 Harv.L.Rev. 1, 60, 62-63 (1944).

entire statement if the two parts are reasonably closely connected." Gov.Br. 24. This passage is clarified later in the section where it indicates that courts attach particular significance to the fact that a declarant was in custody at the time of the statement in determining admissibility: "While courts generally do not accord conclusive effect to the fact of custody, great weight is attributed to it." *Id.* at 346. Accord E. CLEARY, MCCORMICK ON EVIDENCE § 279 at 825-26 (3d ed. 1984); E. CLEARY, MCCORMICK ON EVIDENCE § 279 at 677 (2d ed. 1972). This is similar to the limitation on the admissibility of co-conspirator statements to the duration of the conspiracy. Once the conspiracy is terminated through arrest, or otherwise, other interests and motivations come into play which taint post-conspiratorial assertions. See *Krulewitch v. United States*, 336 U.S. 440 (1949).

None of the cases cited by the government suggest that custodial statements made under the circumstances of Harris's statements would be admissible. In *United States v. Lieberman*, 637 F.2d 95 (2d Cir. 1980), the statement at issue, which incriminated both the declarant and the defendant, was made to a co-conspirator. *Id.* at 102. The court specifically contrasted the statement with one made to a known government agent tending to relieve the declarant of criminal liability which is not against the declarant's interest. See *id.* at 103. In *United States v. Barrett*, 539 F.2d 244 (1st Cir. 1976), the court was concerned with the distinguishable situation of a defendant offering a declarant's statement for *exculpatory* reasons. *Id.* at 249. In holding the statement admissible, the court relied in part on the fact that the declarant's statement was made spontaneously to a close acquaintance. *Id.* at 251. The court acknowledged the scholarly commentary which has criticized admission of inculpatory portions of a statement by virtue of its relationship to self-incriminating portions. *Id.* at 252. Ultimately, because the issue concerned the district court's exclusion of testimony

offered by the defendant, it did not need to concern itself with the Confrontation Clause issue presented instanter. Similarly, *United States v. Casamento*, 887 F.2d 1141 (2d Cir. 1989), *cert. denied*, 493 U.S. 1081 (1990), unlike the instant case, appears to have concerned a spontaneous statement made to a perceived confederate, not a custodial statement made to a known government agent. *Id.* at 1169. Thus, none of these authorities undermine the per se rule of exclusion which Petitioner seeks today.

II. HARRIS'S POST-ARREST STATEMENTS IMPLICATING WILLIAMSON DID NOT MEET THE REASONABLE PERSON STANDARD OF RULE 804(B)(3) OR OTHERWISE BEAR ADEQUATE INDICIA OF RELIABILITY TO RENDER THEM ADMISSIBLE UNDER THE SIXTH AMENDMENT CONFRONTATION CLAUSE.

Relying on its argument that the hearsay exception contained in Rule 804(b)(3) is "firmly rooted," the government argues that the Confrontation Clause does not require corroboration of a statement against interest. Gov.Br. 35. The Petitioner maintains that the hearsay exception contained in this rule is *not* firmly rooted. Argument III, *infra*. In the alternative, the government argues that any statement that qualifies for admission under Rule 804(b)(3) necessarily bears adequate indicia of reliability. This is not true. Several cases have concluded that while a declarant's inculpatory statements met the Rule's requirement that they so far tended to subject the declarant to criminal liability that a reasonable person would not have made them unless believing them to be true, they, nonetheless, excluded the statements upon determining they failed to bear adequate indicia of reliability to justify dispensing with cross-examination. See, e.g., *United States v. Boyce*, 849 F.2d 833, 836-37 (3d Cir. 1988); *United States v. Alvarez*, 584 F.2d 694, 699-702 (5th Cir. 1978). To the extent that a district court's finding

under Rule 804(b)(3) that a statement is one no reasonable person would make unless believing it to be true establishes *ipso facto* adequate indicia of reliability to satisfy Confrontation Clause concerns, Harris's statement failed to meet the test under the Rule.

The government's speculation about Harris's motivation for making his statements and the manner in which the surrounding circumstances impacted on their trustworthiness highlights the essential nature of cross-examination in these circumstances. The government's entire case rested upon the strength of Harris's presumptively untrustworthy statements. No argument for harmless error has been raised; none could be credibly advanced. Only under the close scrutiny of rigorous cross-examination could the trustworthiness of Harris's statement be fairly evaluated.

The government asserts that the district court found Harris's statements were "against his penal interest within the meaning of Rule 804(b)(3). . . ." Gov.Br. 20. Particularly in light of the tremendous weight the government places upon the distinction between a simple "statement against penal interest" and one which a reasonable person would not make unless believing it to be true, see Gov.Br. 32-33 n. 21, 35-36, this assertion is unsupported. At the place in the record indicated by the government, J.A. 51-52, the district judge simply stated, "First, defendant Harris's statements clearly implicated himself, and therefore, are against his penal interest." The court never once stated, or indicated it had considered, whether Harris's statements were ones a reasonable person would not have made unless believing them to be true. See J.A. 31, 35-36, 51-52. Contrary to the government's argument, Harris's statements were self-serving and never could have satisfied the reasonable person standard under Rule 804(b)(3).

The government speculates that contrary to Petitioner's assertion that Harris gave up little by confirming

knowledge that he was couriering drugs, Harris gave up much. The government's speculation is unsound. If Harris truly believed the police had a long way to go to prove his *knowing* possession of the drugs, why would he have admitted his knowledge? Instead, a reasonable person who is caught red handed and is arrested for driving a rental vehicle containing 19 kilograms of cocaine believes that the question of guilt is fait accompli. This perception mirrors the decisions of our courts which routinely convict defendants like Harris on the strength of an *inference* that there was knowing possession of the contraband. Thus, the portion of Harris's statements indicating his knowledge of the contraband only comprised his penal interests marginally.

The government argues Harris did nothing to "minimize his role in the offense and shift blame to Petitioner. . . ." Gov.Br. 20. The record belies this assertion. As stated in the Petitioner's Brief, Harris repeatedly emphasized he was nothing more than a courier. J.A. 37, 38-40. By contrast, he stated initially that the cocaine belonged to Williamson, J.A. 37, explained later that he received the cocaine from an acquaintance of Williamson, J.A. 39, and ultimately stated that Williamson arranged for the acquisition and transportation of the cocaine and was its intended recipient. J.A. 40-41. He never stated that he jointly planned the illegal mission with Williamson or would share in its proceeds. In all of his statements, Harris carefully maintained that he was merely following Williamson's (or Williamson's acquaintance's) directions. Reasonable persons believe that mere couriers are treated less harshly than persons who manage narcotics trafficking operations. Again, this perception certainly mirrors federal narcotics laws and the experience in our courts. Cf. U.S.S.G. § 2D1.1, Application Note 16 (downward departure warranted where offense level based on narcotics quantity over-represents defendants culpability and defendant qualifies for mitigating

role adjustment under section 3B1.2); § 3B1.2 and Application Notes (two to four level reduction in offense level for minor or minimal participants including off loaders and couriers).

The government's assertion that "[t]here is no suggestion in the record that Harris had any motive or desire to implicate Petitioner falsely," Gov.Br. 21, is not credible. Even without being told that any cooperation would be reported to the prosecutor, a reasonable person arrested for committing a narcotics offense knows well that the ticket to leniency regarding the charges that will be filed and the sentence that will be sought is to identify a bigger fish in the pond. Once again, the rules and experience of the courts validate this perception. See Fed.R.Crim.P. 35(b); 18 U.S.C. § 3553(e). If there were any doubt in Harris's mind about this protocol, Agents Steffens and Walton removed the doubt. J.A. 25-26 (Steffens told Harris "that if he wished to cooperate, . . . he would be put in touch with . . . a[n] . . . agent or assistant United States attorney who could explain . . . what cooperation meant and what in turn he might receive to his benefit for that . . .").

The government's explanation of Harris's reluctance to give recorded or sworn statements is far-fetched. Of course, once Harris made his oral statement implicating Williamson he could have had no doubt that Williamson would learn of his accusation. It would obviously make little difference to Williamson's reaction whether the statement was oral, recorded, written, or sworn. On the other hand, if the statements Harris had made were false, it would make a big difference to him if they were recorded, written, or sworn. Harris would have a difficult time denying any statements if they were recorded or written. Indeed, he may well have thought that some criminal penalty would have attached to a recorded or written false statement that did not attach to a false oral statement. Moreover, Harris was certainly aware that a

false statement under oath could result in criminal prosecution and sanctions. Clearly, his refusal to implicate Williamson under oath, after having given three oral statements implicating him, most reasonably reflects his own lack of confidence in the truth of the statements he made.

The government finally speculates that, upon being faced with the specter of being caught in a falsehood (the story about delivering the cocaine to the dumpster), Harris admitted the truth and identified Williamson as the recipient of the cocaine. Gov.Br. 21-22. The government argues that Harris could not bear the compulsion of the government proceeding to the Atlanta dumpster and coming up empty handed. According to the government, a reasonable person would not have made this statement unless believing it to be true. Contrary to the government's argument, Harris had nothing to lose if the agents proceeded to any dumpster he might have identified and came back empty handed. Numerous circumstances in the underworld of narcotics trafficking could have explained the foiled delivery other than the falsity of Harris's initial statement. Contrary to the government's assertion that Harris "had no other practical choice," Gov.Br. 22, other than to implicate Williamson as the recipient, Harris very easily could have explained any failed attempted delivery as the result of other known (or unknown) extenuating circumstances.

Another scenario readily comes to mind. It may well have been that Harris's statement about the Cuban man in Ft. Lauderdale and the delivery to the Atlanta dumpster was true. However, upon realizing that the agents intended to conduct a controlled delivery and that the actual intended recipient would be arrested, Harris's fear of that individual's retaliation prompted him to change the story and falsely implicate Williamson.

The government's attempt to distinguish *Lee v. Illinois* factually is unavailing. Indeed, a comparison of the

nature of the confession in *Lee*, which was insufficient to persuade the majority of its trustworthiness to justify dispensing with cross-examination, to Harris's statements demonstrates that the inculpatory portions of Lee's co-defendant's confession were far more trustworthy than the similar portions of Harris's statements. In *Lee*, the petitioner and co-defendant Thomas were charged with and convicted of committing a double murder. Thomas' confession detailed how he and the petitioner had jointly planned the murder of petitioner's aunt and had then jointly executed both her murder and the murder of her friend. Thomas's written, signed statement was relayed in the first person plural voice: "We had planned," "[w]e had talked," "we had not figure (sic) out," "[w]e had never before discussed," "[w]e decided," "we had to do something. . . ." *Id.*, 476 U.S. at 534-35. Thomas admitted being the one who physically murdered the petitioner's aunt. *Id.*

By contrast, in the instant case, Harris's post-arrest statements did not admit jointly planning or executing a narcotics trafficking operation. Moreover, it can hardly be said that the references to Williamson were "integral" to the self-incriminating portions of Harris's statements. The references to Harris are more accurately described as incidental. Harris's first reference to Williamson (according to agent Walton) was in the context of his statement that he had obtained the cocaine from an unidentified Cuban individual in Ft. Lauderdale. Harris, apparently, added that "the acquisition for (sic) the cocaine had been made by Fredel Williamson of Atlanta. . . ." J.A. 37. Harris further claimed that the cocaine belonged to Williamson. *Id.* In his next statement, Harris explained that he had included Williamson's name on the automobile rental contract because "Mr. Williamson was going to be in Ft. Lauderdale," apparently the location where the vehicle was rented. J.A. 38-39. The next reference was simply that the unidentified Cuban male from whom he

claimed to have procured the cocaine was "an acquaintance of Fredel Williamson. . . ." *Id.* The final reference was that the cocaine was intended to be delivered to him in Atlanta but that a delivery would be impossible because Williamson, who Harris now claimed had been travelling in front of him at the time he was arrested, observed the stop and his trunk being searched. J.A. 40.⁵ Thus, the portions of Harris's statements incriminating Williamson are hardly integral to those portions of the statements marginally incriminating Harris. They were certainly not made in the first person plural voice as were the statements in *Lee*. This clearly was not a case where Harris could not accurately describe his role in the criminal venture without identifying Williamson (or anyone else). Gov.Br. 24.

III. A POST-ARREST CONFESSION OF AN ALLEGED ACCOMPLICE WHICH INCRIMINATES A CRIMINAL DEFENDANT DOES NOT FALL WITHIN A FIRMLY ROOTED HEARSAY EXCEPTION.

The government labors to establish that statements admitted as declarations against penal interest satisfy the

⁵ In Harris's final and most damning statement about Williamson, he said nothing so incriminating of even himself that a reasonable person would not have made the statement unless believing it to be true. In this passage, which primarily concerns the activities of Williamson, Harris merely repeats that he was delivering the cocaine to Atlanta. J.A. 40. However, Harris had twice previously made this statement. He had nothing to lose by repeating it a third time. Thus, even if the government were permitted to bootstrap the admissibility of inculcating a defendant (and arguably self-serving to the accomplice) to those portions of an accomplice's statement incriminating the accomplice, the portions of Harris's statement incriminating Williamson in this passage would be inadmissible.

Confrontation Clause because they fall within a "firmly rooted" hearsay exception. Gov.Br. 24-34. Its efforts, however, are misdirected. As the majority of this Court unequivocally declared in *Lee v. Illinois*, 476 U.S. 530 (1986), statements such as those of Harris against Williamson cannot meaningfully be categorized as declarations against penal interest. *Id.* at 544 n.5. Instead, this case, as *Lee*, must be decided "as involving a confession by an accomplice which incriminates a criminal defendant." *Id.* None of the factual distinctions which the government urges between the statements in *Lee* and those in the instant case alter this core identity between the nature of the statements. The government has not cited, nor can Petitioner find, a single case holding that custodial confessions by an accomplice which incriminate a criminal defendant constitute a firmly rooted hearsay exception. These statements are universally condemned as uniquely and especially suspect. They present grave danger to the reliability of the factfinding process. They utterly fail to meet any of the criteria for a firmly rooted hearsay exception.

Even assuming the relevant category were "declarations against penal interest," the government's argument does not establish it as a firmly rooted exception. The government first argues that this exception is firmly rooted because it is found in the Federal Rules of Evidence. Gov.Br. 26. Inclusion in the Federal Rules of Evidence does not make an exception firmly rooted. In *Idaho v. Wright*, 497 U.S. 805 (1990), this Court rejected the petitioner's argument that the residual hearsay exception, codified in the Federal Rules of Evidence and the Idaho Rules of Evidence at 803(24), is firmly rooted. *Id.*, 110 S.Ct. at 3147. This Court noted that were it to take that position, "virtually every codified hearsay exception would assume constitutional stature, a step this Court has repeatedly declined to take." *Id.* at 3148 (citations omitted).

Nor is it determinative that "a majority of the states have adopted statutes or rules identical or substantially similar to Rule 804(b)(3). . . ." Gov.Br. 26. Regardless of the number of states that may have embraced, for instance, the residual hearsay exception, this would not have converted it into a firmly rooted exception. Moreover, simply stringing out the number of states which have adopted hearsay exceptions similar to Rule 804(b)(3) does not fairly or accurately reflect what judicial or legislative imprimatur has been placed upon the statements which arguably fall within this exception. As the government acknowledges, several states have found statements of an accomplice implicating a defendant so untrustworthy to warrant legislatively banning them from their courts. Gov.Br. 27 n.15. Additionally, notwithstanding general rules permitting introduction of statements against penal interest, several other states have judicially declared these statements inadmissible. *Id.*; Pet.Br. at 20 n.5. This substantial and continuing consensus that these statements are unreliable and their admission violates constitutional rights belies any notion that the declaration against penal interest exception is firmly rooted.⁶

⁶ The government claims that "most of the courts of appeals to have considered the issue have held that the hearsay exception for statements against penal interest is 'firmly rooted.'" Gov.Br. 28 and n.17. Petitioner has previously explained most of these rulings. Pet.Br. 20-22. Regarding *Berisford v. Wood*, 826 F.2d 747, 751 (8th Cir. 1987), *cert. denied*, 484 U.S. 1016 (1988), it does not appear that this issue was even argued and any error in admitting the statement was determined to be harmless. *Id.* at 752. The opinion fails to discuss prior circuit precedent. Its conclusion that the declaration against penal interest exception is firmly rooted contradicts prior circuit caselaw. See, e.g., *Olson v. Greene*, 668 F.2d 421, 427-28 and n.11 (8th Cir.) ("custodial statements implicating a third person do not fall within a firmly rooted hearsay exception"), *cert. denied*, 456 U.S. 1009 (1982); *United States v. Riley*, 657

In an effort to increase the historical duration of the declaration against penal interest exception, the government has endeavored to replant its root. Gov.Br. 29-33. The government acknowledges, as it must, that the leading decision in England, *Sussex Peerage Case*, 11 Cl. & F.85, 8 Eng.Rep. 1034 (1844), held that statements against penal interest were inadmissible. It likewise acknowledges that this Court, in *Donnelly v. United States*, 228 U.S. 243 (1913), followed the rule of the *Sussex Peerage Case* and held that statements against penal interest, unlike statements against pecuniary or proprietary interests, were inadmissible. Relying on the criticism of Wigmore and other "commentators" of the *Sussex Peerage Case* and *Donnelly*, the government essentially urges this Court to ignore the brevity of this exception's history and treat it, instead, as if the cases which rejected the exception, embraced it. The government's quest at historical revisionism must fail. Even if the criticisms upon which the government relies were valid, the question posed by this aspect of the inquiry, whether the declaration against penal interest exception reflects a long standing tradition, cannot be answered by the response to the question, whether it *should have been* part of a long standing tradition.

In its argument that this Court's retreat from *Donnelly* came before the 1976 adoption of the Federal Rules of Evidence, the government has failed to acknowledge *Chambers v. Mississippi*, 410 U.S. 284 (1973). There this Court observed that traditionally, and at the time, statements against penal interest were not included within the

F.2d 1377, 1381-86 (8th Cir. 1981) ("admissibility of collateral inculpatory declarations against penal interest under Fed.R.Evid. 804(b)(3) presents a controversial and complex evidentiary problem"), *cert. denied*, 459 U.S. 111 (1983); *United States v. Love*, 592 F.2d 1022, 1025-26 (8th Cir. 1979); *United States v. Lilley*, 581 F.2d 182, 187-88 (8th Cir. 1978).

declaration against interest exception. *Id.* at 299-300, 93 S.Ct. at 1047-48.⁷

The government's attempt to distinguish the class of hearsay statements criticized as "too large" for meaningful constitutional analysis in *Lee v. Illinois*, 476 U.S. 530, 544 n.5 from the hearsay exception under Federal Rule of Evidence 804(b)(3) is ineffective. Federal Rule of Evidence 804(b)(3), which evolved from the common law and specifically expressed an objective "reasonable person" standard, had been around for nearly ten years when *Lee* was decided. This Court's reference to the declaration against penal interest exception certainly contemplated this prevailing understanding of the exception. It rejected the

⁷ The government's attempt to bypass *Douglas v. Alabama*, 380 U.S. 415 (1965), and *Bruton v. United States*, 391 U.S. 123 (1968), Gov.Br. 32 n.21, cases that presumed the inadmissibility of inculpatory confessions of codefendants, is also unprincipled. It claims that "the out-of-court statement in *Douglas* was not against the declarant's penal interest because it sought to establish his co-defendant as the trigger man in a shooting." *Id.* To the contrary, declarant Lloyd's statement, which admitted that he and Douglas intended to shoot the victims and that he drove the vehicle while Douglas shot at the victims' vehicle, *id.*, 380 U.S. at 417 n.3, unquestionably was against Lloyd's penal interest and substantiated his charge of assault with intent to murder. Regarding *Bruton*, were the declarations against penal interest exception firmly rooted and, thus, the confrontation rights of the defendant unaffected, this Court would have had no reason to concern itself with the efficacy of the jury instruction to ignore the hearsay statement. To the contrary, the Court in *Bruton* declared that the declarant's inculpatory hearsay statement "was clearly inadmissible against [the defendant] under traditional rules of evidence" and indicated that there were no recognized exceptions to the hearsay rule applicable to the defendant's accomplice's confession. *Id.* at 128 n.3. *Accord Cruz v. New York*, 481 U.S. 186, 189-90 (1987) (where two or more defendants are tried jointly, the pretrial confession of one non-testifying defendant is inadmissible against the others).

notion that this exception was firmly rooted. To the extent that there is any material distinction between the common law hearsay exception and Rule 804(b)(3), the distinction would further demonstrate that the exception as presently contemplated by the Federal Rules of Evidence is not firmly rooted.

If the relevant category for analysis is "statements against penal interest," it does not constitute a firmly rooted exception because it does not "rest upon such solid foundations that admission of virtually *any* evidence within [it] comports with the 'substance of constitutional protection.'" *Ohio v. Roberts*, 448 U.S. 56, 66 (1980) (citation omitted) (emphasis added). This exception encompasses a wide variety of hearsay statements including ones that exculpate and inculpate the defendant. These statements are made under innumerable circumstances bearing differently on their trustworthiness. Thus, this exception is similar to the residual hearsay exception which, though contemplating statements with certain common elements tending to indicate trustworthiness, accommodates ad hoc instances which neither categorically nor universally provide reasonable guarantees of trustworthiness. *Wright*, 110 S.Ct. at 3147. Like the residual hearsay exception, the declaration against penal interest exception is not firmly rooted.

The "substance of constitutional protection" implicates, at least, all of the functional goals underlying the Confrontation Clause – ensuring a statement under oath; forcing the declarant to submit to cross-examination, "the greatest legal engine ever invented for the discovery of truth"; and permitting the jury determining the defendant's fate to observe the witness's demeanor in assessing his credibility. Petitioner submits that, regarding custodial confessions by an accomplice which incriminate a defendant, a defendant can *never* secure this protection absent cross-examination of the declarant. However, at the very least, categorically admitting, *inter alia*, the

unsworn, presumptively untrustworthy custodial statements of a defendant's alleged accomplice, without forcing the accomplice to submit to cross-examination, fails to meet these goals. A court's speculation that the declarant spoke from a trustworthy state of mind fails to provide the functional equivalence of this constitutional protection. For this reason, too, this exception is not firmly rooted.

Respectfully submitted,

BENJAMIN S. WAXMAN

ROBBINS, TUNKEY, ROSS,

AMSEL & RABEN, P.A.

2250 Southwest Third Avenue

Fourth Floor

Miami, Florida 33129

Telephone: (305) 858-9550

(9)

No. 93-5256

Supreme Court, U.S.

FILED

MAR 24 1994

OFFICE OF THE CLERK

In the

Supreme Court of the United States

October Term, 1993

FREDEL WILLIAMSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**On Writ of Certiorari
To the United States Court of Appeals
For the 11th Circuit**

**BRIEF OF THE STATE OF CALIFORNIA, et al.
AS AMICI CURIAE
IN SUPPORT OF RESPONDENT**

**DANIEL E. LUNGREN
Attorney General of California**

* **M. HOWARD WAYNE
Deputy Attorney General**

**110 West A Street, Suite 1100
San Diego, California 92101
(619) 645-2218**

* **Counsel of Record**

BEST AVAILABLE COPY

45 pp

The states who joined California in the brief:

LARRY ECHOHAWK
Idaho Attorney General
P.O. Box 83720
Boise, Idaho 83720-0010

PAMELA CARTER
Attorney General of Indiana
219 State House
Indianapolis, Indiana 46204

ROBERT T. STEPHAN
Attorney General of Kansas
Judicial Center, 2nd Floor
Topeka, Kansas 66612-1597

CHRIS GORMAN
Attorney General of Kentucky
State Capitol
Room 116
Frankfort, Kentucky 40601

RICHARD P. IEYOUB
Attorney General
Louisiana Department of Justice
P.O. Box 94005
Baton Rouge, Louisiana 70804

J. JOSEPH CURRAN, JR.
Attorney General of Maryland
200 Saint Paul Place
Baltimore, Maryland 21202

FRANK J. KELLEY
Attorney General of Michigan
525 West Ottawa
Lansing, Michigan 48909

BEST AVAILABLE COPY

JOSEPH P. MAZUREK
Attorney General, State of Montana
Justice Building
215 North Sanders
Helena, Montana 59620

DON STENBERG
Nebraska Attorney General
Department of Justice
2115 State Capitol
Lincoln, Nebraska 68509

FRANKIE SUE DEL PAPA
Attorney General of Nevada
Capitol Complex
Carson City, Nevada 89710

MICHAEL F. EASLEY
Attorney General of North Carolina
2 East Morgan Street
Raleigh, North Carolina 27602-0629

LEE FISHER
Ohio Attorney General
30 East Broad Street
17th Floor
Columbus, Ohio 43215-3428

JEFFREY B. PINE
Attorney General
72 Pine Street
Providence, Rhode Island 02903

THE HONORABLE T. TRAVIS MEDLOCK
Attorney General of South Carolina
Post Office Box 11549
Columbia, South Carolina 29211

JAN GRAHAM
Utah Attorney General
236 State Capitol
Salt Lake City, Utah 84114

JEFFREY L. AMESTORY
Attorney General of Vermont
109 State Street
Montpelier, Vermont 05609-1001

JAMES S. GILMORE, III
Attorney General of Virginia
101 North Eighth Street
Richmond, Virginia 23219

QUESTIONS PRESENTED

1. Whether a post-arrest confession by an accomplice implicating a defendant, offered as an admission against penal interest of an unavailable declarant under Federal Rule of Evidence 804(b)(3), bears adequate indicia of reliability to render it admissible under Rule 804(b)(3) and the Sixth Amendment Confrontation Clause?
2. Whether a post-arrest confession by an accomplice implicating a defendant, offered as an admission against penal interest of an unavailable declarant under Federal Rule of Evidence 804(b)(3), constitutes a firmly rooted hearsay exception rendering it presumptively reliable and not subject to further analysis under the Sixth Amendment Confrontation Clause?
3. Whether 804(b)(3)'s requirement that a statement must be corroborated by circumstances clearly indicating its trustworthiness, is subject to the further requirement of *Idaho v. Wright*, 497 U.S. 805 (1990), that the only circumstances that can be considered are those surrounding the making of the statement?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Authorities	iii
Interest of Amici	1
Summary of Argument	1
Argument:	
I. A DECLARATION AGAINST PENAL INTEREST HAS ADEQUATE INDICIA OF RELIABILITY TO BE ADMITTED BECAUSE IT IS A FIRMLY ROOTED EXCEPTION TO THE HEARSAY RULE	2
II. REGINALD HARRIS' STATEMENTS WERE ADMISSIBLE AS DECLARATIONS AGAINST PENAL INTEREST.	17
Conclusion	30

TABLE OF AUTHORITIES

	Page
CASES:	
<i>Band's Refuse Removal, Inc. v. Borough of Fair Lawn,</i> 62 N.J. Super. 522, 163 A.2d 465 (App. Div. 1960)	11
<i>Berrisford v. Wood,</i> 826 F.2d 747 (8th Cir. 1987), cert. denied 484 U.S. 1016	16
<i>Bruton v. United States,</i> 391 U.S. 123 (1968)	5, 12, 13, 25, 26
<i>California v. Green,</i> 399 U.S. 149 (1970)	3
<i>Chambers v. Mississippi,</i> 410 U.S. 284 (1973)	4
<i>Commonwealth v. Carr,</i> 373 Mass. 617, 369 N.E. 2d 970 (1977)	15
<i>Commonwealth v. Nash,</i> 457 Pa. 296, 324 A.2d 344 (1974)	15
<i>Delli Paoli v. United States,</i> 352 U.S. 232 (1957)	5
<i>Donnelly v. United States,</i> 228 U.S. 243 (1913)	10
<i>Douglas v. Alabama,</i> 380 U.S. 415 (1965)	5, 22, 26
<i>Dutton v. Evans,</i> 400 U.S. 74 (1970)	4

<i>Hines v. Commonwealth</i> , 136 Va. 728, 117 S.E. 843 (1923)	10
<i>Idaho v. Wright</i> , 497 U.S. 805 (1990)	7, 9, 16
<i>Jennings v. Maynard</i> , 946 F.2d 1502 (10th Cir. 1991)	16
<i>Laumer v. United States</i> , 409 A.2d 190 (D.C. 1979)	15
<i>Lee v. Illinois</i> , 476 U.S. 530 (1986)	6, 8, 22, 25
<i>Mancusi v. Stubbs</i> , 408 U.S. 204 (1972)	3
<i>Mason v. United States</i> , 257 F.2d 359 (10th Cir. 1958)	11
<i>Mattox v. United States</i> , 146 U.S. 140 (1892)	3
<i>Mattox v. United States</i> , 156 U.S. 237 (1895)	3
<i>New Mexico v. Earnest</i> , 477 U.S. 648 (1987)	22
<i>Newberry v. Commonwealth</i> , 191 Va. 445, 61 S.E. 2d 318 (1950)	10
<i>Ohio v. Roberts</i> , 448 U.S. 56 (1980)	2, 7, 16
<i>People v. Aranda</i> , 63 Cal.2d 518, 407 P.2d 265 (1963)	6

<i>People v. Brown</i> , 26 N.Y.2d 88, 257 N.E.2d 16 (1970)	11, 15
<i>People v. Frierson</i> , 53 Cal.3d 730, 808 P.2d 1197, 280 Cal.Rptr. 440 (1991)	17
<i>People v. Gordon</i> , 50 Cal.3d 1223, 792 P.2d 251, 270 Cal.Rptr. 451 (1990)	17
<i>People v. Lettrich</i> , 413 Ill. 172, 108 N.E.2d 488 (1952)	11
<i>People v. Morgan</i> , 76 N.Y.2d 493, 562 N.E.2d 485, 561 N.Y.S.2d 409 (1990)	23
<i>People v. Spriggs</i> , 60 Cal.2d 868, 389 P.2d 377, 36 Cal. Rptr. 841 (1964)	11
<i>People v. Wilson</i> , 17 Cal.App.4th 271, 21 Cal.Rptr.2d 420 (1993)	16, 19
<i>Powell v. Harper</i> , 5 Car. & P. 590 (1833)	10
<i>Rice v. Marshall</i> , 709 F.2d 1100 (6th Cir. 1983), cert. denied 465 U.S. 1034	25
<i>Snyder v. Massachusetts</i> , 292 U.S. 97 (1934)	3
<i>Standen v. Standen</i> , Peake 32 (1791)	10

<i>State v. Black</i> , 291 N.W.2d 208 (Minn. 1980)	21
<i>State v. Cook</i> , 135 N.H. 668, 610 A.2d 800 (1992)	16
<i>State v. Earnest</i> , 106 N.M. 411, 744 P.2d 539 (1987)	22, 24
<i>State v. Hansen</i> , 312 N.W.2d 96 (Minn. 1981)	20, 21
<i>State v. Jankiewicz</i> , 831 S.W.2d 195 (1992 Mo. en banc)	16
<i>State v. Sego</i> , 266 N.J. Super. 406, 629 A.2d 1362 (App. Div. 1993)	16
<i>State v. St. Pierre</i> , 111 Wash.2d 105, 759 P.2d 383 (1988)	21, 26
<i>State v. Tucker</i> , 109 Ore.App. 519, 820 P.2d 834 (1991)	16
<i>Sussex Peerage Case</i> , 11 Clark & F. 85, 8 Eng. Rept. 1034 (1844))	9, 10
<i>Sutter v. Easterly</i> , 354 Mo. 282, 189 S.W.2d 284 (1945)	10
<i>Taylor v. Commonwealth</i> , 821 S.W.2d 72 (Ky. 1991), cert. denied 112 S.Ct. 1243	19, 24
<i>Thomas v. State</i> , 580 N.E. 2d 224 (Ind. 1991)	15

<i>United States v. Alvarez</i> , 584 F.2d 694 (5th Cir. 1978)	25
<i>United States v. Annunziato</i> , 293 F.2d 373 (2nd Cir. 1961)	11
<i>United States v. Bailey</i> , 581 F.2d 341 (3rd Cir. 1978)	23
<i>United States v. Barrett</i> , 539 F.2d 244 (1st Cir. 1976)	25
<i>United States v. Fields</i> , 871 F.2d 188 (1st Cir. 1989)	16
<i>United States v. Flores</i> , 985 F.2d 770 (5th Cir. 1993)	16, 25
<i>United States v. Garcia</i> , 897 F.2d 1413 (7th Cir. 1990)	21, 24
<i>United States v. Garris</i> , 616 F.2d 626 (2nd Cir. 1980), cert denied 447 U.S. 926	18, 22, 24
<i>United States v. Gonzalez</i> , 559 F.2d 1271 (5th Cir. 1977)	20
<i>United States v. Harris</i> , 403 U.S. 573 (1971)	4
<i>United States v. Katsougrakis</i> , 715 F.2d 769 (2nd Cir. 1983)	16
<i>United States v. Lilley</i> , 581 F.2d 182 (8th Cir. 1978)	19
<i>United States v. Love</i> , 592 F.2d 1022 (8th Cir. 1979)	20

<i>United States v. Magana-Olvera</i> , 917 F.2d 401 (9th Cir. 1990)	22
<i>United States v. Matlock</i> , 415 U.S. 164 (1974)	4
<i>United States v. Sarmiento-Perez</i> , 633 F.2d 1092 (5th Cir. 1981)	16, 25
<i>United States v. Seeley</i> , 892 F.2d 1 (1st Cir. 1989)	16
<i>United States v. Taggart</i> , 944 F.2d 837 (11th Cir. 1991)	16, 18
<i>United States v. Thomas</i> , 571 F.2d 285 (5th Cir. 1978)	25
<i>United States v. Vernor</i> , 902 F.2d 1182 (5th Cir. 1990), cert. denied 498 U.S. 922	21, 24
<i>United States v. York</i> , 933 F.2d 1343 (7th Cir. 1991)	16
STATUTES AND LEGISLATIVE MATERIALS:	
Alaska Rules of Evidence Rule 804(b)(3)	14
Arizona Rules of Evidence Rule 804(b)(3)	14
California Evidence Code § 1230	12, 15, 16
Colorado Rules of Evidence 804(b)(3)	14
Delaware Uniform Rules of Evidence Rule 804(b)(3)	14
Federal Rules of Evidence 804(b)(3)	1, 14

Florida Evidence Code § 90.804(2)(c)	14
Hawaii Rules of Evidence Rule 804 (b)(3)	14
Idaho Rules of Evidence Rule 804(b)(3)	14
Indiana Rules of Evidence Rule 804(b)(3)	14
Iowa Rules of Evidence Rule 804(b)(3)	14
K. Redden & S. Saltzburg, Federal Rules of Evidence Manual 326 (1975)	13
Kansas Statutes Annotated § 60-460(j)	12, 15
Kentucky Rules of Evidence Rule 804(b)(3)	15
Louisiana Code of Evidence Art. 804(B)(3)	14
Maryland Rules of Procedure, Evidence, Rule 5-804(b)(3)	15
Michigan Rules of Evidence Rule 804(b)(3)	14
Military Rules of Evidence Rule 804(b)(3), 45 Fed. Reg. 16,932	15
Minnesota Rules of Evidence Rule 804(b)(3)	14
Mississippi Rules of Evidence Rule 804(b)(3)	14
Montana Rules of Evidence Rule 804(b)(3)	14
Nebraska Rules of Evidence § 27-804(2)(c)	14
New Hampshire Rules of Evidence Rule 804(b)(3)	14
New Jersey Evidence Rule 63(10)	12
New Mexico Rules of Evidence Rule 804(b)(3)	14

North Carolina Rules of Evidence Rule 804(b)(3)	15
Ohio Rules of Evidence Rule 804(b)(3)	15
Oklahoma Evidence Code § 2804(B)(3)	14
Oregon Rules of Evidence § 40.465(3)(c)	14
Preliminary Draft of the Proposed Rules of Evidence, 46 F.R.D. 161, 386 (1969)	11-13
Proposed Rules of Evidence, 56 F.R.D. 184, 321 (1972)	13, 17, 24
Puerto Rico Rules of Evidence 64(B)(3)	15
Revised Draft of Proposed Rules of Evidence, 51 F.R.D. 315 (1971)	13
Rhode Island Rules of Evidence Rule 804(b)(3)	14
South Dakota Codified Laws § 19.16-32	14
Tennessee Rules of Evidence Rule 804(b)(3)	14
Texas Rules of Criminal Evidence Rule 803(24)	15
Utah Rules of Evidence Rule 804(b)(3)	15
Virgin Islands Code Ann. tit. 5 § 932(10)	15
Washington Rules of Evidence Rule 804(b)(3)	15
West Virginia Rules of Evidence Rule 804(b)(3)	15
Wisconsin Stat. Ann. § 908.045(4)	15
Wyoming Rules of Evidence Rule 804(b)(3)	15

OTHER MATERIALS:

5 J. Wigmore, Evidence, § 1421, p. 253 (J. Chadbourn rev. 1974)	8-10
Comment, Federal Rules of Evidence 804(b)(3) and Inculpatory Statements Against Penal Interest, 66 Calif. L. Rev. 1189, 1190 fn. 7 (1978)	12, 14
Evidence in America, The Federal Rules in the States	15
Louisell and Mueller, Federal Evidence, § 485, p. 987 (1980)	12
McCormick on Evidence (4th Ed. 1992)	17, 27
Model Code of Evidence	11
Note: Declarations Against Penal Interest: Standards of Admissibility Under an Emerging Majority Rule, 56 Boston University Law Review 148 (1976)	18

INTEREST OF THE AMICI CURIAE

The issue here is whether the statements of a non-testifying accomplice, made while the accomplice was in custody and which were truly against the accomplice's penal interest, may be admitted in a separate trial against a defendant inculpated by those statements.

States have adopted provisions of law identical or similar to Federal Rules of Evidence 804(b)(3), which allow the admission of declarations against penal interest. How this Court interprets that rule in this case will have a significant impact on state law enforcement. Amici believe that when a statement is truly against penal interest, there are sufficient indicia of reliability to permit admission of the statement, consistent with the Confrontation Clause.

SUMMARY OF ARGUMENT

Modern Sixth Amendment jurisprudence has involved harmonizing the right of confrontation with the necessity of admitting reliable hearsay evidence. Because truth-finding is the central mission of the Confrontation Clause, a hearsay exception with adequate indicia of reliability meets the requirements of Confrontation. Under the Court's jurisprudence, a dispositive indicator of reliability is whether the exception is considered to be "firmly rooted" in the law. The determination whether a hearsay exception is firmly rooted turns on logic, experience and the length and breadth of its acceptance.

The exception for declarations against penal interest is firmly rooted because reason and experience show that individuals do not lightly make statements which can result in their convictions of crimes unless they believe the statements are true. The origin of the exception dates back nearly 300 years. It has been adopted by most American jurisdictions. A statement by an accomplice which qualifies as a declaration against penal interest satisfies the Confrontation Clause, regardless of custody status, and should be admitted on that basis. Reginald Harris' statements to DEA Agent Donald Walton qualified because they were truly against his penal

interest, they were voluntary and they were not the product of government inducement. They were properly admitted at petitioner's trial as declarations against penal interest.

ARGUMENT

I

A DECLARATION AGAINST PENAL INTEREST HAS ADEQUATE INDICIA OF RELIABILITY TO BE ADMITTED BECAUSE IT IS A FIRMLY ROOTED EXCEPTION TO THE HEARSAY RULE

A. The Supreme Court Has Interpreted the Confrontation Clause to Admit Evidence Which Comes Within a Firmly Rooted Exception to the Hearsay Rule.

For more than 100 years this Court has ruled that admission of some hearsay evidence which is within an exception to the hearsay rule does not violate the Confrontation Clause. Notably, this Court has held that hearsay evidence which comes within a firmly rooted exception to the hearsay rules does not violate the Confrontation Clause.

The hearsay exception for declarations against penal interest is firmly rooted because reason and experience show that individuals do not lightly make statements which can result in their convictions of crimes unless they believe the statements are true.

1. The Trend of Cases Supports Admission of Declarations Against Penal Interest.

The Court explained the reliability of evidence which came within a firmly rooted hearsay exception in *Ohio v. Roberts*, 448 U.S. 56 (1980). The case involved the use of a preliminary examination transcript at trial. The Court said that read literally, the language of the Sixth Amendment

would exclude all hearsay. However the historical evidence leaves little doubt the Confrontation Clause was intended to include some hearsay. *Id.*, at 63. Thus, the Court has recognized that competing interests, if closely examined, may dispense with confrontation at trial. *Id.*, at 64, citing earlier cases.

The Court further stated that the Confrontation Clause permits the admission of hearsay that is marked with such trustworthiness that "there is no material departure from the reasons of the general rule. *Id.*, at 65, quoting *Snyder v. Massachusetts*, 292 U.S. 97, 107 (1934). It noted that in *Mancusi v. Stubbs*, 408 U.S. 204, 213 (1972), the Court had said its concern was to insure there are indicia of reliability which have been widely viewed as determinative of whether a statement may be placed before the jury in the absence of confrontation. *Id.*, at 65. Accordingly, a hearsay exception must rest upon such solid foundation that admission of virtually any evidence within it comports with the substance of constitutional protection. *Id.*, at 66. It noted that Confrontation Clause concerns and the hearsay rule are designed to protect similar values and stem from the same roots. *Ibid.* Reliability can be inferred without more in a case where the evidence falls within a "firmly rooted hearsay exception." *Ibid.*, emphasis added. In other cases, the evidence must be excluded absent a showing of particularized guarantees of trustworthiness. *Ibid.*

The holding in *Roberts* followed from a line of cases which found that reliable hearsay evidence is admissible. In *California v. Green*, 399 U.S. 149, 157-159 (1970), the Court upheld the constitutionality of the hearsay exception for prior inconsistent statements. As far back as 1892 the Court admitted a hearsay statement in the form of a dying declaration. *Mattox v. United States*, 146 U.S. 140, 152 (1892). In the second *Mattox* case the Court upheld admission of the hearsay statement over a claim of denial of confrontation, stating that "technical adherence to the letter of a constitutional provision may occasionally be carried farther than is necessary to the just protection of the accused and farther than the safety of the public will warrant." *Mattox v. United States*, 156 U.S. 237, 243 (1895).

Prior to *Roberts* the Court had repeatedly upheld admission of declarations against penal interest as reliable hearsay. In *Dutton v. Evans*, 400 U.S. 74 (1970), the Court upheld admission of a co-conspirator's statement. A plurality of the Court found the exception was a "long established and well-recognized rule of state law," and also found that the statement was against the declarant's penal interest. *Id.*, at 83, 89.

Thereafter, in discussing declarations against penal interest, the Court stated in *United States v. Harris*, 403 U.S. 573 (1971):

People do not lightly admit a crime and place critical evidence in the hands of the police in the form of their own admissions. Admissions of crime, like admissions against proprietary interests, carry their own indicia of credibility - sufficient at least to support a finding of probable cause to search. At 583.

In *Chambers v. Mississippi*, 410 U.S. 284, 300-301 (1973) this Court ruled that hearsay statements offered by the defendant should have been admitted because they were against the declarant's penal interest. Thereafter, in *United States v. Matlock*, 415 U.S. 164 (1974), the declaration by a woman included a statement she cohabited with the defendant, to whom she was not married. This Court found the statement admissible, noting that such cohabitation would not seem to be a relationship to which one would falsely confess since it was a crime in the state where the declaration was made. Accordingly, her "statements were against her penal interest and they carried their own indicia of reliability. This was sufficient in itself . . . to warrant admitting [the statement] to evidence for consideration by the trial judge." *Id.*, at 176, emphasis added.

2. Douglas and Bruton

There is apparent tension between the line of cases discussed above which support admission of declarations

against interest as reliable hearsay evidence and two cases from the 1960s which appear to say that statements from an accomplice which implicate another are always unreliable, regardless of whether they are against the accomplice's penal interest or not.

In *Douglas v. Alabama*, 380 U.S. 415 (1965), the defendant and the declarant were in the same car from which a single bullet was fired at the victim. The declarant told police that the defendant had fired the shot. The men were tried separately and the declarant refused to testify at defendant's trial. His statement was admitted under the guise of cross-examination. This Court ruled that admission of the statement was error since the inability of the defendant to cross-examine the declarant denied him the right of cross-examination secured by the Confrontation Clause. *Id.*, at 419. It should be noted, however, that the statement was not against the declarant's penal interest, since in it he shifted the blame for firing the single shot to the defendant.

Bruton v. United States, 391 U.S. 123 (1968) is a case often cited for the proposition that an accomplice's statements are unreliable. There the defendant had been tried with William Evans. A postal inspector testified that while in custody Evans confessed to him that he and the defendant committed the armed robbery.¹ The defendant's conviction was affirmed by the circuit court because the trial judge instructed the jury not to consider Evans' statement against the defendant.

Certiorari was granted to reconsider *Delli Paoli v. United States*, 352 U.S. 232 (1957), which had upheld the conviction of a defendant in a joint trial where the jury was instructed to disregard the co-defendant's confession in judging the defendant. *Bruton* at 123-124, 125. The Supreme Court noted that Evans' statement was hearsay and was inadmissible against the defendant under traditional rules of

¹ Evans' conviction was reversed by the circuit court because the confession was tainted by a prior involuntary confession. He was acquitted on retrial. *Id.*, at 133, fn. 9.

evidence. Significantly, it added that no recognized exception to the hearsay rule was before it, and it intimated "no view whatever that such exceptions necessarily raise questions under the Confrontation Clause." *Id.*, at 128, fn. 3.

Reversal was predicated on the views expressed by Justice Roger Traynor of the California Supreme Court in *People v. Aranda*, 63 Cal.2d 518, 528-529, 407 P.2d 265, 271-272 (1963). This Court quoted Justice Traynor's opinion to the effect that the jury cannot be expected to perform the overwhelming task of considering an admissible confession against one party and ignoring it in determining the guilt or innocence of the other. *Bruton* at 131.

Justice White, in dissent, spoke more expansively. His position was that the confession was not admissible against the defendant because it was inadmissible hearsay. *Id.*, at 138. Since there was nothing in the record to suggest the jury did not follow the trial court's instruction not to consider it against defendant, he would have affirmed the conviction. *Id.*, at 139. Then, in dicta, he said "[a]s to the defendant, the confession of the codefendant is wholly inadmissible. It is hearsay, subject to all the dangers of inaccuracy which characterize hearsay generally Due to his strong motivation to implicate the defendant and to exonerate himself, a codefendant's statements about what the defendant said or did are less credible than ordinary hearsay." *Id.*, at 141.

3. Lee v. Illinois

The tension between the two lines of cases surfaced in *Lee v. Illinois*, 476 U.S. 530 (1986). This was a five to four opinion which involved admission of a co-defendant's confession in a joint trial. The majority found that the co-defendant's statement, as a confessing accomplice, was presumptively unreliable absent sufficient "indicia of reliability" to overcome the presumption. *Id.*, at 539. Referring to the dissent in *Bruton*, the Court elaborated that the truth-finding function of the Confrontation Clause is threatened when an accomplice's confession is sought to be introduced without cross-examination. The Court found the

confession was unreliable because the co-defendant confessed only after he was told the defendant had confessed; implicated him, and then only when the defendant implored him to "share the rap." *Id.*, at 544. In a footnote the majority rejected the state's characterization of the confession as a "declaration against penal interest," adding that it viewed the concept as too large a class for Confrontation Clause analysis.

In dissent, Justice Blackmun, joined by then-Associate Justice Rehnquist and two other justices, found there were more than adequate "indicia of reliability" to allow admission of the statement, above all, that the statement was thoroughly and unambiguously adverse to the declarant's penal interest. *Id.*, at 551. The dissent noted that while the Court has treated the confessions of codefendants with suspicion, it has not held such confession *per se* inadmissible under the Confrontation Clause. Accomplice confessions ordinarily are untrustworthy because they are not unambiguously adverse to the penal interests of the declarant. *Id.*, at 552-553.

Thereafter, the Court decided *Idaho v. Wright*, 497 U.S. 805 (1990), which involved a physician testifying to a statement by a child under the "residual exception" to the hearsay rule. The Court reaffirmed *Roberts'* holding that if evidence is offered under a hearsay exception, once the declarant is shown to be unavailable, the statement is admissible only if it bears adequate "indicia of reliability." This is where either the evidence falls within a firmly rooted hearsay exception, or there are particularized guarantees of trustworthiness. *Wright*, at 814-815. This Court concluded that the residual exception was not firmly rooted, since, as a catch-all by definition, its components do not share the same tradition of reliability that supports admissibility for an established exception. *Id.*, at 817.

B. The Declaration Against Penal Interest Has Become a Firmly Rooted Exception to the Hearsay Rule.

While the issue of whether the declaration against penal interest is a firmly rooted exception has not been answered by this Court, it should be resolved in the affirmative. The

against interest exception traces its roots to the beginning of the hearsay rule. The rejection of the exception in a nineteenth century English ruling was illogical, rejected by commentators, and overturned over a period of years. Experience and reason show that people are unlikely to make statements which are truly against their penal interest unless they believe them to be true. More than 70% of the states admit inculpatory declarations against penal interest. The Federal Rules of Evidence specifically provide for admission as well. A number of courts have specifically found the exception is firmly rooted. Based on its rationale, its long history and its widespread adoption, the exception should be recognized as firmly rooted.

1. Rationale for Admission of Declarations Against Penal Interest

The rationale for admission of declarations against penal interest is the same as most other hearsay exceptions: necessity and reliability. Because the fact finder would lose the benefit of the evidence, since the declarant is unavailable and this evidence cannot be obtained from some other source, admission of reliable hearsay evidence is better than the total absence of evidence on the issue. 5 J. Wigmore, Evidence, § 1421, p. 253 (J. Chadbourn rev. 1974).

Reliability flows from the belief that the self-inculcating nature serves as a substitute for the oath and cross-examination. The rationale of the declaration against interest exception is that people usually do not make statements against their interest unless they believe them to be true. *Lee*, at 551 (Blackmun, J., dissenting); see also, 5 Wigmore, Evidence, § 1422, pp. 253-254.

2. Early Exclusion of Declarations Against Penal Interest

Wigmore explains that the prohibition on the admission of hearsay evidence occurred during the time of the Restoration, about 1675 to 1690. The exclusion of hearsay was based on the fact that the other side could not cross-

examine the witness. 5 Wigmore, Evidence § 1364, pp. 18, 20. Approximately at this same time exceptions to the hearsay rule began to develop.

The purpose of the hearsay rule is the key to its exceptions. As stated by this Court in *Idaho v. Wright*:

The theory of the hearsay rule . . . is that the many possible sources of inaccuracy and untrustworthiness which may lie underneath the bare untested assertion of a witness can best be brought to light and exposed, if they exist, by the test of cross-examination. But this test or security may in a given instance be superfluous; it may be sufficiently clear, in that instance, that the statement offered is free enough from the risk of inaccuracy and untrustworthiness so that the test of cross-examination would be a work of supererogation.

Id., at 819, quoting 5 Wigmore, Evidence, § 1420, p. 251. The declaration against interest exception can be traced back as early as any other exception. 5 Wigmore, Evidence § 1455, pp. 323-324. It has two separate origins. On one side, it became customary after the hearsay rule was established to receive in evidence the account entries of a deceased person charging himself with the receipt of money. The second source was a series of rulings on receiving oral declarations in disparagement of one's proprietary title. The lines of precedent proceeded independently until about the beginning of the nineteenth century when acceptance was gained for the principle that all declarations of facts against interest by deceased persons were to be received. 5 Wigmore, Evidence, § 1476, p. 350.

In the much-criticized *Sussex Peerage Case*, (11 Clark & F. 85, 8 Eng. Rept. 1034 (1844)), the House of Lords held that the against interest exception did not include statements of fact subjecting the declarant to criminal liability, but was

confined to statements of facts against either pecuniary or proprietary interest.²

The exclusion of declarations against penal interest was accepted by most American courts. 5 J. Wigmore, Evidence § 1476, p. 352, and cases cited at footnote 9. In *Donnelly v. United States*, 228 U.S. 243 (1913) the Court refused to admit a statement in which the deceased declarant admitted the killing for which the defendant was convicted because the statement was against the declarant's penal interest, rather than his pecuniary or proprietary interest. *Id.*, at 273. In dissent Justice Holmes said "no other statement is so much against interest as a confession of murder, it is far more calculated to convince than dying declarations, which would be let in to hang a man." *Id.*, at 278.

3. Acceptance of Declarations Against Penal Interest.

Although the rule of the *Sussex Peerage Case* became the majority rule in the United States, a number of courts rebelled against its irrationality. In *Hines v. Commonwealth*, 136 Va. 728, 117 S.E. 843 (1923), the Virginia Supreme Court held that evidence of an extra-judicial confession which was exculpatory of the accused and made by an unavailable witness was admissible as an exception to the hearsay rule. The Virginia court reaffirmed the holding in *Newberry v. Commonwealth*, 191 Va. 445, 61 S.E. 2d 318 (1950). In *Sutter v. Easterly*, 354 Mo. 282, 189 S.W.2d 284 (1945), the Missouri Supreme Court accepted an out-of-court statement in

² Declarations against penal interest by living persons had been found admissible, prior to the *Sussex Peerage Case*, in *Standen v. Standen*, Peake 32 (1791) where a marriage register entry recited the publication of banns and the clergyman's confession he had married without banns, and *Powell v. Harper*, 5 Car. & P. 590 (1833), a libel charging the plaintiff with being a receiver of stolen goods and a statement by a declarant that the declarant had stolen them. 5 Wigmore, Evidence, § 1476, pp. 351-352, fn. 8.

which the declarant admitted to perjury in his testimony at a prior trial. The court held that sound reasons required the exception to the hearsay rule be extended to this character of declaration, as in every realistic sense it is a statement against the declarant's interest and unlikely to be either deliberately false or heedlessly incorrect. *Id.*, at 289, 290.

In *People v. Lettrich*, 413 Ill. 172, 108 N.E.2d 488 (1952), the Illinois Supreme Court admitted a confession, and held to exclude it would be absurd and shocking to all sense of justice. The New Jersey Supreme Court accepted a declaration against penal interest in *Band's Refuse Removal, Inc. v. Borough of Fair Lawn*, 62 N.J. Super. 522, 163 A.2d 465 (App. Div. 1960), noting the statement was clearly against the declarant's interest and had every indicia of trustworthiness. *Id.*, at 485, 486. In an opinion written by Justice Traynor, the California Supreme Court admitted a declaration against penal interest. *People v. Spriggs*, 60 Cal.2d 868, 389 P.2d 377, 36 Cal. Rptr. 841 (1964). The New York rule was modernized in *People v. Brown*, 26 N.Y.2d 88, 257 N.E.2d 16 (1970), to permit declarations against penal interests. Federal courts found the prohibition on declarations against penal interest an "indefensible limitation" (*United States v. Annunziato*, 293 F.2d 373, 378 (2d Cir. 1961) cert. denied 368 U.S. 919) and stated that modern authorities support the admission of such statements (*Mason v. United States*, 257 F.2d 359, 360 (10th Cir. 1958), cert. denied 358 U.S. 831). "[A]n increasing amount of decisional law recognize[d] exposure to punishment for crime as a sufficient stake [for admission]." Advisory Committee's Note to the Preliminary Draft of the Proposed Rules of Evidence, 46 F.R.D. 161, 386 (1969).

Statutes also began to accept declarations against penal interest. Rule 509 of the Model Code of Evidence, adopted by the American Law Institute on May 15, 1942, provided, in pertinent part:

- (1) A declaration is against the interest of a declarant if the judge finds that the fact asserted in the declaration was at the time of the declaration . . . so far subjected him to . . .

criminal liability . . . that a reasonable man in his position would not have made the declaration unless he believed it to be true.

The states of California, Kansas and New Jersey adopted provisions that admitted declarations against penal interest.³

4. Federal Rules of Evidence Rule 804(b)(3)

Adoption of the Federal Rules of Evidence began with the appointment of an advisory commission in 1961 to study the advisability of uniform rules of evidence in federal court. A preliminary draft was circulated in March 1969. Proposed Rule 804(b)(4) expanded the against interest exception to reach statements against penal interest. Louisell and Mueller, *Federal Evidence*, § 485, p. 987 (1980). The Advisory Committee's notes stated that "exposure to criminal liability satisfies the against-interest requirement." Preliminary Draft at 385. However the preliminary draft specifically excluded inculpatory declarations. Preliminary Draft at 378.⁴ The Advisory Committee's Notes explained the dissenting opinion in *Bruton* was the reason for this prohibition. It noted that the majority in *Bruton* assumed the inadmissibility of the implicating confession and centered its discussion on the

³ California Evidence Code § 1230 (adopted 1965); Kansas Statutes Annotated § 60-460(j) (adopted 1963); New Jersey Evidence Rule 63(10) (adopted 1967).

⁴ There are two broad categories of declarations against penal interest, "inculpatory declarations" and "exculpatory declarations". The former refers to a statement that inculpates a defendant in a crime and the latter to a statement that seeks to relieve the defendant of guilt. See, Comment, Federal Rules of Evidence 804(b)(3) and Inculpatory Statements Against Penal Interest. 66 Calif. L. Rev. 1189, 1190 fn. 7 (1978).

effectiveness of a limiting instruction. Preliminary Draft at 386.⁵

However, the Rules of Evidence as promulgated by this Court on November 20, 1972, eliminated the prohibition on inculpatory declarations. It authorized admission of a "statement which was at the time of its making . . . so far tended to subject him to . . . criminal liability . . . that a reasonable man in his position would not have made the statement unless he believed it to be true." Proposed Rules of Evidence, 56 F.R.D. 184, 321 (1972). The Proposed Rules imposed a corroboration requirement on exculpatory declarations. *Ibid.*⁶

When the Proposed Rules were submitted to Congress, the House Judiciary Committee reinserted the ban on the admission of inculpatory statements. The Committee explained that it did so to codify what it believed was the holding of *Bruton*. Report of the House Committee on the Judiciary, reprinted in K. Redden & S. Saltzburg, *Federal Rules of Evidence Manual* 326 (1975). The Senate Judiciary Committee removed this prohibition on inculpatory declarations, stating:

Codification of a constitutional principle is unnecessary and, where the principle is under development, often unwise. . . .

⁵ This provision and rationale also appeared in the Revised Draft of Proposed Rules of Evidence, 51 F.R.D. 315, 438-439, 444 (1971).

⁶ The Advisory Committee's Notes explained that while the common law's refusal to concede the adequacy of penal interest was illogical, there was the distrust of evidence of fabricated confessions exculpating another. The Committee stated "The requirement of corroboration should be construed in such a manner as to effectuate its purpose of circumventing fabrication." *Id.*, at 327.

Report of the Senate Committee on the Judiciary, reprinted in Redden at 328. The Conference Committee accepted the Senate amendment, "reflecting the general approach in the Rules of Evidence to avoid attempting to codify constitutional evidentiary principles." Report of the House and Senate Conferees, reprinted in Redden at 329.

Thus, in its final form adopted by Congress, Rule 804(b)(3) authorizes admission of statements against penal interests in which the declarant inculcates the defendant. Moreover, the Advisory Committee's Notes specifically state that statements which are truly against penal interest are admissible. Comment, Federal Rules of Evidence 804(b)(3) at 1198.

C. Widespread Acceptance of Declarations Against Penal Interest

Federal Rules of Evidence 804(b)(3) has been adopted in a form that admits inculpatory declarations by 27 states and the Military Rules of Evidence.⁷ It will become effective in

⁷ Alaska Rules of Evidence Rule 804(b)(3); Arizona Rules of Evidence Rule 804(b)(3); Colorado Rules of Evidence 804(b)(3); Delaware Uniform Rules of Evidence Rule 804(b)(3); Florida Evidence Code § 90.804(2)(c) (pursuant to c. 90-174, § 4); Hawaii Rules of Evidence Rule 804 (b)(3); Idaho Rules of Evidence Rule 804(b)(3); Indiana Rules of Evidence Rule 804(b)(3); Iowa Rules of Evidence Rule 804(b)(3); Louisiana Code of Evidence Art. 804(B)(3); Michigan Rules of Evidence Rule 804(b)(3); Minnesota Rules of Evidence Rule 804(b)(3); Mississippi Rules of Evidence Rule 804(b)(3); Montana Rules of Evidence Rule 804(b)(3); Nebraska Rules of Evidence § 27-804(2)(c); New Hampshire Rules of Evidence Rule 804(b)(3); New Mexico Rules of Evidence Rule 804(b)(3); Oklahoma Evidence Code § 2804(B)(3); Oregon Rules of Evidence § 40.465(3)(c); Rhode Island Rules of Evidence Rule 804(b)(3), South Dakota Codified Laws § 19.16-32; Tennessee Rules of Evidence Rule

a 28th state, Maryland, on July 1, 1994.⁸ Four other states have adopted it with a provision that inculpatory statements must be corroborated.⁹ Two states and two territories have adopted similar provisions which permit admission of inculpatory declarations against penal interest.¹⁰ Inculpatory declarations against penal interest have also been accepted by the courts of at least three states and the District of Columbia.¹¹

In summary, 36 states, two territories, the District of Columbia and the Military courts all admit inculpatory

804(b)(3); Utah Rules of Evidence Rule 804(b)(3); Washington Rules of Evidence Rule 804(b)(3); West Virginia Rules of Evidence Rule 804(b)(3); Wisconsin Stat. Ann. § 908.045(4); Wyoming Rules of Evidence Rule 804(b)(3); and Military Rules of Evidence Rule 804(b)(3), 45 Fed. Reg. 16,932. See, Evidence in America, The Federal Rules in the States.

⁸ Maryland Rules of Procedure, Evidence, Rule 5-804(b)(3).

⁹ Kentucky Rules of Evidence Rule 804(b)(3); North Carolina Rules of Evidence Rule 804(b)(3); Ohio Rules of Evidence Rule 804(b)(3); and Texas Rules of Criminal Evidence Rule 803(24).

¹⁰ California Evidence Code § 1230; Kansas Statutes Annotated § 60-460(j); Puerto Rico Rules of Evidence 64(B)(3); and Virgin Islands Code Ann. tit. 5 § 932(10).

¹¹ Massachusetts: *Commonwealth v. Carr*, 373 Mass. 617, 369 N.E. 2d 970, 974 (1977); New York: *People v. Brown*, 26 N.Y.2d 88, 91, 308 N.Y.S. 825, 826-827, 257 N.E. 2d 16, 17-19 (1970); Pennsylvania: *Commonwealth v. Nash*, 457 Pa. 296, 324 A.2d 344, 346 (1974); and the District of Columbia: *Lawmer v. United States*, 409 A.2d 190, 199 (D.C. 1979).

declarations against penal interest. Several state courts have held that the exception is firmly rooted. *People v. Wilson*, 17 Cal.App.4th 271, 278, 21 Cal.Rptr.2d 420 (1993) [California Evidence Code section 1230 is firmly rooted in the law], *State v. Jankiewicz*, 831 S.W.2d 195, 198 (1992 Mo. banc.), *State v. Cook*, 135 N.H. 668, 610 A.2d 800, 808 (1992) (concurring opinion of Thayer, J, "would seem to be firmly rooted"), *State v. Sego*, 266 N.J. Super. 406, 414, 629 A.2d 1362, 1367 (App. Div. 1993), *State v. Tucker*, 109 Ore.App. 519, 526, 820 P.2d 834, 838 (1991).

The First, Second, Seventh, Eighth, Tenth and Eleventh circuits have also found that the exception is firmly rooted. *United States v. Seeley*, 892 F.2d 1, 2 (1st Cir. 1989)¹², *United States v. Katsougrakis*, 715 F.2d 769, 775 (2nd Cir. 1983), *United States v. York*, 933 F.2d 1343, 1363 (7th Cir. 1991), *Berrisford v. Wood*, 826 F.2d 747, 751 (8th Cir. 1987), cert. denied 484 U.S. 1016, *Jennings v. Maynard*, 946 F.2d 1502, 1505 (10th Cir. 1991), *United States v. Taggart*, 944 F.2d 837, 840 (11th Cir. 1991).

On the other hand, the exception has met with considerable resistance in the Fifth Circuit, which has held that the exception is not firmly rooted. *United States v. Flores*, 985 F.2d 770, 775-776 (5th Cir. 1993); *United States v. Sarmiento-Perez*, 633 F.2d 1092 (5th Cir. 1981).

¹² Despite holding that the exception is firmly rooted, *Seeley* also grafted a corroboration requirement to declarations against penal interest. *Id.*, at 2, see also discussion in *United States v. Fields*, 871 F.2d 188, 192 (1st Cir. 1989). This seems inconsistent with *Roberts*, because the hallmark of a firmly rooted exception is that if evidence satisfies its requirements, no corroboration is required. 448 U.S. at 66. In view of *Idaho v. Wright*, *supra*, which limits corroboration to the circumstances surrounding the making of the statement, this dispute may be no more than semantic. If the circumstances surrounding the making of the declaration are sufficient to meet the requirements of the exception, the statement is admissible without further corroboration.

II

REGINALD HARRIS' STATEMENTS WERE ADMISSIBLE AS DECLARATIONS AGAINST PENAL INTEREST.

A. Requirements for the Exception

Federal Rule 804(b)(3) requires as a threshold matter that the declarant be unavailable. As to its against interest provision, the statement must have, at the time it was made, so far tended to subject the declarant to criminal liability that no reasonable person in the declarant's position would have made the statement unless believing it was true. Rule 804(b)(3).

Whether a statement is in fact against interest must be determined from the circumstances of each case. Advisory Committee's Notes, Proposed Rules, 56 F.R.D. at 328. As stated in *People v. Gordon*, 50 Cal.3d 1223, 1251, 792 P.2d 251, 270 Cal.Rptr. 451 (1990):

The decision whether trustworthiness is present [in a declaration against penal interest] requires the court to apply to the peculiar facts of the individual case a broad and deep acquaintance with the ways human beings actually conduct themselves in the circumstances material under the exception. Such an endeavor allows, in fact demands, the exercise of discretion.

See also, *People v. Frierson*, 53 Cal.3d 730, 745, 808 P.2d 1197, 280 Cal.Rptr. 440 (1991).

The case law indicates the factors the courts look upon in making this determination are (1) whether the statement is truly against interest or whether instead the declarant trivializes his role and shifts primary blame to the person he inculcates, (2) whether the statement is made when there are inducements from the government (which relates to whether the statement was not contrary to the declarant's interest), and (3) whether the statement is voluntary. See also, McCormick

on Evidence (4th Ed. 1992), § 319, pp. 343-346, Note: Declarations Against Penal Interest: Standards of Admissibility Under an Emerging Majority Rule, 56 Boston University Law Review 148 (1976).

B. Application of the Factors

1. Truly Against Penal Interest

To be admissible as a declaration against penal interest, the statement must truly be against the declarant's penal interest. The holdings of federal and state courts applying Rule 804(b)(3) and its state equivalents illustrate this test. For example, in *United States v. Taggart*, 944 F.2d 837 (11th Cir. 1991) Woods told a Secret Service agent that he bought marijuana from the defendant. When he paid her with a \$100 bill, Woods said he was given seven counterfeit \$10 bills as change. The agent testified as to Woods' statement. The Eleventh Circuit applied Federal Rule 804(b)(3) and held Woods' statement was contrary to his penal interest because it implicated him in the marijuana transaction. *Id.*, at 840.

United States v. Garis, 616 F.2d 626 (2nd Cir. 1980), cert. denied 447 U.S. 926 involved a defendant who took part in a bank robbery and told his sister, Phyllis, of his participation. Phyllis concealed that she knew how to reach him from the FBI. Phyllis worked at a bank; the defendant told her he needed \$5,000 to evade police and would send someone to her teller window for it. When a woman appeared at Phyllis' window and demanded money, she gave her \$5,000. Following that robbery Phyllis voluntarily went to the FBI and made a statement inculcating her brother. She claimed lack of memory at defendant's trial. The Second Circuit found the statement was against Phyllis' interest since it was an admission of being an accessory with knowledge of the offense. *Id.*, at 630. The court noted that the Advisory Committee stated that whether a statement is in fact against interest must be determined from the circumstances of each case. *Id.*, at 631-632. Here the court found (1) that nothing in the record suggested that Phyllis was given any reason to believe a statement which inculpated another would help her;

and (2) the statement was not calculated to sacrifice defendant so as to aid her. *Id.*, at 633.

In *People v. Wilson*, *supra*, the defendant was arrested after shooting at occupants of a vehicle. He called his wife from jail and told her he "had shot some Mexicans." He directed her to the hidden gun and told her how to dispose of it, which she did. She advised police about this, but refused to testify at trial. *Id.*, at 274. Her statement to the police was admitted against her husband. The court upheld admission of the statement since it was against her penal interest. At the time she concealed the weapon she was aware her husband had used the gun to commit a felony, and her concealment of the weapon made her an accessory under California Penal Code section 32. *Id.*, at 276.

In *Taylor v. Commonwealth*, 821 S.W.2d 72 (Ky. 1991), cert. denied 112 S.Ct. 1243, the defendant and Wade were charged with the kidnapping, robbery and murder of two high school students. Wade gave a statement to police which set out the facts and incriminated himself and the defendant. Wade was tried separately, received a life term, and refused to testify at the defendant's trial. His statement was admitted pursuant to Kentucky Rules of Evidence Rule 804(b)(3).

The Kentucky Supreme Court upheld admission of the statement, finding the declarant, Wade, admitted his active participation in the crimes. *Id.*, at 75. The fact the declarant initially denied involvement and confessed only after being told he had failed a polygraph and had been identified did not affect his statement. *Ibid.*

In contrast, courts have excluded statements which were primarily exculpatory of the declarant. For example, in *United States v. Lilley*, 581 F.2d 182 (8th Cir. 1978), the defendant was charged with forging a treasury check payable to Clayton Meeks. A Secret Service agent interviewed the defendant's husband, who was the prime suspect. He said that the defendant asked him to sign the check since it was owed to her as child support, and that the defendant helped him forge Meeks' name on the check. At trial, the defendant claimed that her husband had committed the forgery. Her husband's statement to the agent was admitted against her.

The Eighth Circuit ruled that the statement was not a declaration against penal interest because it was only partly against the husband's interest. While the husband admitted writing Meeks' name on the check, his statement was intended to shift suspicion away from him and to alter the impact of his admission he signed Meeks' name. *Id.*, at 187.

Similarly, in *United States v. Gonzalez*, 559 F.2d 1271 (5th Cir. 1977) the circuit court held that the declarant's statement naming the defendant in a drug case was not against interest. At the time he made the statement the declarant had already been convicted, and no statement he made was going to subject him to further liability. *Id.*, at 1273. See also, *United States v. Love*, 592 F.2d 1022, 1025-1026 (8th Cir. 1979).

In *State v. Hansen*, 312 N.W.2d 96 (Minn. 1981), a reward was offered after shots were fired at guards at a construction site. Harold Fischer was interviewed by police and told that if he gave a statement the state would not charge his wife or daughter, and he would be charged with a misdemeanor instead of attempted murder. Fischer described a meeting at his house where it was decided to shoot up the construction site. He said he went to the site but did not fire any shots, and the defendant was one of the shooters. Fischer refused to testify at trial and his statement was introduced as a declaration against penal interest.

The Minnesota Supreme Court stated that it was not convinced that Fischer's statement was against penal interest. The court noted that the statement was made after a promise of leniency and it was primarily exculpatory of his conduct. *Id.*, at 101.¹³

¹³ Petitioner portrays this case as holding that Minnesota, inter alia, has excluded declarations against penal interest through judicial opinion. Pet.Br., pp. 19-20, fn. 5. As can be seen the statement was only excluded because it failed to meet the requirements for penal interest exceptions. In fact *Hansen* reaffirmed that a declarant's statement to police can qualify as a declaration against penal interest when there is no promise of leniency. *Id.*, at 101, citing to *State v. Black*, 291

2. Government Inducements

The fact that a declaration was made without any inducement from law enforcement is frequently cited as a basis for admitting a declaration against interest. The issue goes to the heart of whether the statement is contrary to interest. When incentives for a statement are offered, statements are often excluded.

For example, in *United States v. Garcia*, 897 F.2d 1413 (7th Cir 1990), Carlos Garcia and Jose Garcia were stopped for speeding. A search of their vehicle pursuant to consent yielded marijuana. Carlos Garcia was arrested, advised of his constitutional rights and gave statements which implicated himself and Jose Garcia in transportation of marijuana and conspiracy. Carlos Garcia later pled guilty and his statement were used against Jose Garcia. The statement was clearly against Carlos' penal interest. Admission was upheld by the Seventh Circuit, which found there was nothing in the record which indicated Carlos acted under a motivation to curry favor. He voluntarily made the statements after advisement of his constitutional rights, and did not enter into any plea agreement for his statement. *Id.*, at 1421.

There was also no government inducement in *United States v. Vernor*, 902 F.2d 1182 (5th Cir. 1990), cert. denied 498 U.S. 922. There the defendant and his father committed a bank robbery, with the defendant acting as the getaway driver. Declarant was identified (dye package exploded), arrested and, after the advisement of his constitutional rights, gave a statement to the police which implicated himself and the defendant. The Fifth Circuit concluded the declarant would not have made the statement unless it was true. Faced with overwhelming evidence of his own guilt, he took full responsibility for his part and did not try to shift the blame to the defendant. There was nothing to show that he was

N.W.2d 208, 213 (Minn. 1980). Petitioner makes the same incorrect representation as to *State v. St. Pierre*, 111 Wash.2d 105, 759 P.2d 383 (1988), discussed *infra*.

attempting to curry favor or was trying to enter into a plea agreement. *Id.*, at 1188. See also, *Garris* at 633.

In *State v. Earnest*, 106 N.M. 411, 744 P.2d 539 (1987), the declarant and another were arrested and charged with murder. The declarant told police he had cut the victim's throat and the defendant had shot the victim in the head. The declarant refused to testify at trial. The New Mexico Supreme Court held that the statement was reliable because (1) the declarant had made the statement without any offer of leniency; (2) he admitted trying to cut the victim's throat, which at the time was thought to have been the cause of death and which could have subjected him to the death penalty, and (3) he did not try to shift responsibility to the defendant, but instead implicated all participants. *Id.*, at 540.¹⁴

On the other hand, courts have excluded statements which were made upon an offer of leniency. In *United States v. Magana-Olvera*, 917 F.2d 401 (9th Cir. 1990) the declarant was arrested after selling drugs to an undercover agent. The agent told him that in exchange for cooperation he might receive a lenient treatment. The declarant identified the defendant as his supplier. The following week, while in jail, the agent told declarant that a formal agreement would be drawn up between the declarant and an assistant United States

¹⁴ This opinion followed remand from this Court, which vacated New Mexico's prior reversal of the conviction and directed reconsideration in light of *Lee*. A concurring opinion by Justice Rehnquist, joined by then-Chief Justice Burger, Justices O'Connor and Powell, stated that *Lee* had made clear that to the extent *Douglas* interpreted the Confrontation Clause to require an opportunity for cross-examination prior to admission of a co-defendant's statement, it was no longer good law. Accordingly, the state was entitled to attempt to overcome the presumption of unreliability which attaches to a co-defendant's statement by demonstrating that the particular statement at issue has sufficient indicia of reliability to satisfy that concern. *New Mexico v. Earnest*, 477 U.S. 648, 649-650 (1987).

attorney. The declarant said the defendant had supplied him with cocaine several times during the year and had been present when declarant sold drugs to the agent. The declarant refused to testify at trial, and the agent's testimony of his statements was admitted.

The Ninth Circuit said that in applying the exception, each statement must solidly inculcate the declarant and be one that a reasonable person in the declarant's position would not have made unless believing it to be true. *Id.*, at 407. Here the statements were not sufficiently against the declarant's interest because the government offered inducements for him to cooperate. Moreover, the statements trivialized the declarant's role by pointing to the defendant as the kingpin. *Id.*, at 409.

Analogously, in *United States v. Bailey*, 581 F.2d 341 (3rd Cir. 1978) the declarant named his accomplice as the other participant in a bank robbery pursuant to an agreement with the government. The circuit court found that the declarant's motive was to help himself because of lenient treatment promised in the agreement. *Id.*, at 345-346, fn.4.

A statement was excluded for a similar reason in *People v. Morgan*, 76 N.Y.2d 493, 562 N.E.2d 485, 561 N.Y.S.2d 409 (1990). The declarant was arrested following the sale of half a kilo of cocaine to an undercover officer. The declarant agreed to testify at the grand jury pursuant to an agreement that he would receive a lesser term. He testified to the grand jury that he was only acting as a go-between for the defendant. He refused to testify at trial, and his statement was read there.

The New York Court of Appeals held that a declarant's penal interest must be of sufficient magnitude or consequence so as to eliminate the probability of a motive to misrepresent the facts. *Id.*, at 487. Here the grand jury testimony was not sufficiently and imminently against his penal interest to satisfy the core reliability prerequisite for admission. *Id.*, at 485. Moreover, the conditional nature of the criminal charges against him gave the declarant a motive to minimize his role, which he did in describing himself only as a courier. *Id.*, 562 N.E.2d at 488.

3. Voluntariness

In the cases discussed above in which the declarant was in custody when the statement was made, the fact that the declarant was advised of his or her constitutional rights, waived those rights, and made the statement voluntarily was cited by the court as a basis for admission. *Garcia* at 1421, *Garris* at 633, *Vernor* at 1188, *Earnest* at 540, *Taylor* at 75.

4. Custody

The Advisory Committee's Notes state that custody "may" be a factor in determining whether a statement qualifies as a declaration against penal interest. Proposed Rules, 56 F.R.D. at 328 (citing *Bruton*). However, the majority of courts do not accord a conclusive effect to that fact. See, e.g. *Rice v. Marshall*, 709 F.2d 1100, 1004 (6th Cir. 1983), cert. denied 465 U.S. 1034. In *Lee* this Court did not make a *per se* rule that any declaration made in custody was inadmissible. *Id.*, at 544. Rather, as the cases discussed above note, custody is a factor which raises concerns of inducements for declarants to say things which are not true, but it is not the determinative issue.

In contrast, the Fifth Circuit has come to the conclusion that any declaration made in custody must be excluded. The cases by which it reached this proposition are not well reasoned.

United States v. Alvarez, 584 F.2d 694 (5th Cir. 1978), demonstrates the jaundiced eye with which the Fifth Circuit views inculpatory declarations against penal interest. In that case Jose Lopez pled guilty, received probation, and testified that Lucio Mejorado told him that defendant was his drug supplier. The Fifth Circuit excluded the statement. After finding Mejorado's statement was sufficiently against his penal interest (*id.*, at 699-700), it held that the trustworthiness of Lopez' testimony had not been sufficiently established since he presumably testified in the hope of receiving preferential treatment. *Id.*, at 701. That is not the correct test for admitting hearsay evidence. The test of Lopez' credibility was cross-examination, just like the credibility of any other

witness, not presumption. The hearsay issue was the reliability of Mejorado's statement.

The second factor relied upon by the court for exclusion was the "virtual dearth of circumstances corroborating the declaration." Rule 804(b)(3) requires corroboration only for exculpatory declarations.¹⁵

In *Sarmiento-Perez*, the Fifth Circuit declared that a custodial confession of a non-testifying, separately tried co-conspirator/codefendant which directly implicates the accused under Rule 804(b)(3) is always inadmissible. This holding was based on *Douglas* and the dissent in *Bruton*. The *Sarmiento-Perez* court observed that the first two drafts of Rule 804(b)(3) discussed *Douglas* and *Bruton* and expressed concern that a statement made in custody might be motivated by a desire to curry favor. The court concluded that Rule 804(b)(3) should be interpreted to include the prohibition rejected by Congress: that the against penal interest exception does not include a statement or confession offered against the accused in a criminal case, made by a co-defendant or other person implicating both himself and the accused. *Sarmiento Perez*, at 1094-1095.

Thus, the Fifth Circuit rejected the required case-by-case determination of whether a statement is against interest, and instead announced a *per se* exclusion of all statements which are made in custody. It deviated from the intent of Congress and from the rationale for admission of declarations against penal interest.

In *United States v. Flores*, *supra*, the Fifth Circuit held that declarations against penal interest do not constitute a firmly rooted exception to the hearsay rule. *Id.*, at 775-776, fn. 13, 779. Instead it found that confessions of accomplices are presumptively unreliable because they may be the product

¹⁵ The *Alvarez* court relied on *United States v. Barrett*, 539 F.2d 244 (1st Cir. 1976) and *United States v. Thomas*, 571 F.2d 285 (5th Cir. 1978) for the corroboration requirement. Both cases cited involved exculpatory declarations.

of the declarant's desire to shift or spread blame, curry favor, avenge himself or divert attention to another. *Id.*, at 775-776. Again, this is a rejection of the-by-case analysis of the evidence in favor of a *per se* rule of exclusion.

The position of the Fifth Circuit diverges from other circuit and state court decisions. In the cases discussed in sections II-B-1 through II-B-3 that involved statements made in custody to police, the fact of custody was not determinative.¹⁶

The Fifth Circuit is wrong in finding that custody is determinative. If a statement is truly against penal interest, which means that it is not made for the purpose of obtaining an advantage, there is no reason it should not be admitted regardless of the custody status of the declarant.

C. Reginald Harris' Statements Met the Requirements to be Admitted as Declarations Against Penal Interest.

Based on the rule, the rationale for the exception and the history of case law applying it, Reginald Harris' statements were properly admitted as declarations against penal interest.¹⁷

¹⁶ See also, *State v. St. Pierre, supra*. There two participants in a murder confessed to police and named the defendant as their accomplice. Based on the circumstances surrounding the making of the statements, the Washington Supreme Court upheld their admission. *Id.*, at 387-389. There were two murders in this case and the court excluded the statement as to the second murder because in it the declarant sought to diminish his liability by claiming he tried to help the victim.

¹⁷ Amici agree with the statement of facts of the United States and do not repeat those facts herein. Instead, amici simply refer to the key facts relevant to amici's argument.

First, the declarations were truly against Harris' penal interest. The trial judge specifically found Harris' statements clearly implicated him, and therefore were against his penal interest. JA 51. In both accounts Harris admitted that he knew that cocaine was in his vehicle, that he drove the vehicle and was transporting cocaine to be delivered to another person. This was a knowing admission of trafficking in commercial quantities of cocaine. It was against Harris' penal interest. A reasonable person would not have made the statements unless he believed it was true. It was made under circumstances - to law enforcement - that Harris knew would be damaging. They were the type of statements that would be admitted against Harris when he was prosecuted. McCormick on Evidence, at p. 344. In fact, the government sought to use the statements against him.

Secondly, the statements were voluntary. The record shows contact with Agent Walton was initiated by Harris. Harris had told Walton that he had requested Agent Stephens contact him to arrange for a controlled delivery of the cocaine. JA 54. After Harris was transported to the Marshal's Service office in Macon, Walton advised him of his constitutional rights, which Harris waived. JA 37-38, 43. The entire interview was no more than 20 to 30 minutes in length. JA 43.

Third, the statement was not obtained in exchange for a promise of leniency or as part of plea negotiations.¹⁸ No promise was made by Agent Walton. Agent Walton testified at the hearing on admission of the statements:

¹⁸ Petitioner attempt to preempt this argument by contending "because Harris was left to fantasize about what benefit he might possibly secure, his incentive to curry favor was even greater than had his interrogators specified the limits upon what benefit he might achieve." Pet. Br., p. 26, fn 9. While it is perfectly appropriate to hold the government responsible for what it says, to fix responsibility on the possibility of declarant's delusions strains credulity.

Q What promises did the agent [Stephens] made as to what reward Harris would receive for cooperation in this case?

A It is my understanding Agent Stephens provided him with no promise of any reward of any type for his cooperation.

Q Didn't Agent Stephens tell Harris that if he cooperated, that it would be documented on his behalf and relayed to the Assistant United States Attorney that would be handling this matter?

A I believe he did say that, as well as myself having said the same thing when he arrived here.

Q What does that mean? Does that mean you are going to give this information, and doesn't that normally dissolve (sic) itself into lenient treatment on behalf of the Assistant United States Attorney's Office?

A No, sir. I think it is exactly what it says.
JA 26.

In fact Harris was prosecuted for, and convicted of, precisely the same offenses as petitioner.

Fourth, the statements did not attempt to shift blame. Harris fully acknowledged his role in the knowing transportation of cocaine. He was not just a "mule" or a courier, as his statements and evidence showed that he previously knew petitioner from Atlanta (JA 28), knew petitioner well enough to be frightened of him (JA 30), the car in which Harris was apprehended had been leased in Atlanta (which was in the direction Harris had been traveling) with petitioner's name on it, and there was an envelope addressed to petitioner in the car. Tran. 83-84, 101-102, exhs. 3, 11.

While it could be argued that Harris assigned a larger role in the conspiracy to petitioner than himself, the issue is whether the statements were more disserving than self serving. That requires a balancing test. Here, on balance the statements were greatly more inculpatory of Harris than exculpatory of him.

Reginald Harris' statement met the requirements of a declaration against penal interest. Since a declaration against penal interest is a firmly rooted exception to the hearsay rule, the statement was properly admitted.

CONCLUSION

For the foregoing reasons, the judgment of the Eleventh Circuit should be affirmed.

DATED: March 21, 1994

Respectfully submitted,

DANIEL E. LUNGREN
Attorney General of California

GEORGE WILLIAMSON
Chief Assistant Attorney General

GARY W. SCHONS
Senior Assistant Attorney General

FREDERICK R. MILLAR, JR.
Supervising Deputy Attorney General

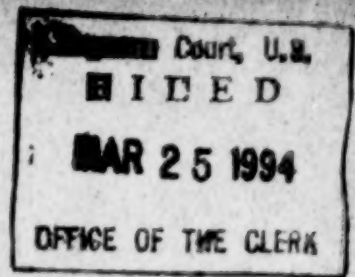
* M. HOWARD WAYNE
Supervising Deputy Attorney General

110 West A Street, Suite 1100
San Diego, California 92101
(619) 645-2218

Counsel for *Amici* States

* *Counsel of Record*
3/21/94

10



NO. 93-5256

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

FREDEL WILLIAMSON

Petitioner,

vs.

UNITED STATES OF AMERICA

Respondent.

ON WRIT OF CERTIORARI TO THE
ELEVENTH CIRCUIT COURT OF APPEAL

BRIEF OF WAYNE COUNTY, MICHIGAN
AS AMICUS CURIAE IN SUPPORT
OF THE RESPONDENT,
THE UNITED STATES OF AMERICA

JOHN D. O'HAIR
Prosecuting Attorney
County of Wayne

TIMOTHY A. BAUGHMAN
Chief of Research,
Training and Appeals
1441 St. Antoine
Detroit, MI 48226
313 224-5792

BEST AVAILABLE COPY

69 pp

STATEMENT OF THE QUESTION

I.

MAY A CONFESSION OR ADMISSION OF A NONTESTIFYING CODEFENDANT BE ADMITTED INTO EVIDENCE AS A DECLARATION AGAINST PENAL INTEREST WHERE THE FOUNDATIONAL REQUIREMENTS FOR THE RULE ITSELF ARE MET, AS THESE ALSO SATISFY THE CONSTITUTION; AND IS CONSIDERATION OF CORROBORATIVE EVIDENCE OF THE TRUTH OF THE STATEMENT RELEVANT TO THE FOUNDATIONAL/CONSTITUTIONAL INQUIRY?

TABLE OF CONTENTS

Statement of the Question	1
Index of Authorities	iii
Interest of the amicus	2
Statement of the Case	3
Argument	4

I.

A CONFESSION OR ADMISSION OF A NONTESTIFYING CODEFENDANT MAY BE ADMITTED INTO EVIDENCE AS A DECLARATION AGAINST PENAL INTEREST WHERE THE FOUNDATIONAL REQUIREMENTS FOR THE RULE ITSELF ARE MET, AS THESE ALSO SATISFY THE CONSTITUTION; CONSIDERATION OF CORROBORATIVE EVIDENCE OF THE TRUTH OF THE STATEMENT IS RELEVANT TO THE FOUNDATIONAL/CONSTITUTIONAL INQUIRY.

Introduction	4
--------------	---

I.

The Development of the Confrontation Clause Test: "Sufficient Indicia of Reliability So As To Afford the Trier of Fact A Satisfactory Basis For Evaluating The Truth of the Statement

II.	The Sufficient Indicia of Reliability Test and Declarations Against Penal Interest: What Is Relevant To The Inquiry?	18
A)	Firmly Rooted Exceptions	18
B)	The Independent Inquiry Into Reliability: Is Evidence Corroborating the Truth of Portions of the Statement Relevant?	2 2
III.	Declarations Against Penal Interest, the Reliability Inquiry, and the Lower Courts	31
IV.	Synthesis	47
A)	The Firmly Rooted Exception Approach	47
B)	Consideration of Corroborative Evidence	52
	Conclusion	60
	Relief	6 2

INDEX OF AUTHORITIES

<u>CASE</u>	<u>PAGE</u>
Bourjaily v United States, 483 US 171, 97 L Ed 2d 144, 107 S Ct 2775 (1987)	18
Bruton v United States, 391 US 123, 88 S Ct 1620, 20 L Ed 2d 476 (1968)	4
California v Green, 399 US 149, 26 L Ed 2d 489, 90 S Ct 1930 (1970)	8
Cruz v New York, 481 US 186, 95 L Ed 2d 162, 107 S Ct 1714 (1987)	25
Donnelly v United States, 228 US 243, 277, 57 L Ed 820 (1913)	50
Dutton v Evans, 400 US 74, 27 L Ed 2d 213, 91 S Ct 210 (1970)	13
Hutlet's Trial, 5 How St. Tr 1185, 1192 (1660)	49
Idaho v Wright, 111 L Ed 2d 638 (1990)	28
Lee v Illinois, 476 US 530, 90 L Ed 2d 514, 106 S Ct 2056 (1986)	21
Mancusi v Stubbs, 408 US 204, 33 L Ed 2d 293, 92 S Ct 2308 (1972)	15

Ohio v Roberts, 448 US 56, 65 L Ed 2d 597, 100 S Ct 2531 (1980)	16
Parker v Randolph, 442 US 62, 60 L Ed 2d 713, 99 S Ct 2132 (1979)	26
People v Poole, 444 Mich 151 (1993)	45
Pointer v Texas, 380 US 400, 13 L Ed 2d 923, 85 S Ct 1065 (1965)	9
Powell v Harper, 5 Carr and P 590 (1833)	49
Standen v Standen, Peake 32 (1791)	49
State v Kiewert, 605 A2d 1031 (N.H. 1992)	43
The Sussex Peerage Case, 8 Eng Rep 1034 (1844)	49
United States v Bailey, 581 F2d 341 (CA 3, 1978)	35
United States v Garcia, 897 F2d 1413 (CA 7, 1990)	40
United States v Inadi, 475 US 387, 89 L Ed 2d 390, 106 S Ct 1121 (1986)	16
United States v Katsougrakis, 715 F2d 769 (CA 2, 1983)	40

United States v Layton, 855 F2d 1388 (CA 9, 1988)	40
United States v Lilley, 581 F2d 182 (CA 8, 1978)	31
United States v Palumbo, 639 F2d 123 (CA 3, 1981)	35
United States v Riley, 657 F2d 1377 (CA 8, 1981)	32
United States v Sarmiento-Perez, 633 F2d 1092 (CA 5, 1981)	37
United States v Seeley, 892 F2d 1 (CA 1, 1989)	40
United States v Vernor, 902 F2d 1182 (CA 5, 1990)	38
United States v York, 933 F2d 1343 (CA 7, 1991)	41

Other Sources

McCormick, <u>Evidence</u> (2d edition)	5,9
McCormick, <u>Evidence</u> (3d edition)	49,50
5 Wigmore, <u>Evidence</u>	6,8,9,14,49,50,52

INTEREST OF THE AMICUS

Amicus is the County of Wayne, Michigan, by the Wayne County Prosecutor's Office. The Office of the Wayne County Prosecuting Attorney is the largest in the State of Michigan, and the issue before this Court has arisen with some frequency in the County and thus within the State, with cases currently pending involving the issue before the Court.

Counsel for amicus has appeared before the Court on four occasions, and the Wayne County Prosecutor's Office has appeared on nine occasions. Amicus has also filed as amicus previously before the Court, as well as before the Michigan Supreme Court. The issue before the Court is of great practical and jurisprudential importance, and amicus desires to present its perspective for the possible assistance of the Court.

STATEMENT OF THE CASE

Amicus concurs with the statement of the case of the Government, as Respondent.

I.

A CONFESSION OR ADMISSION OF A NONTESTIFYING CODEFENDANT MAY BE ADMITTED INTO EVIDENCE AS A DECLARATION AGAINST PENAL INTEREST WHERE THE FOUNDATIONAL REQUIREMENTS FOR THE RULE ITSELF ARE MET, AS THESE ALSO SATISFY THE CONSTITUTION; CONSIDERATION OF CORROBORATIVE EVIDENCE OF THE TRUTH OF THE STATEMENT IS RELEVANT TO THE FOUNDATIONAL/CONSTITUTIONAL INQUIRY.

Introduction

When Bruton v United States, 391 US 123, 88 S Ct 1620, 20 L Ed 2d 476 (1968) was decided, the joinder and severance/confrontation clause issue there was occasioned by the fact that the codefendant's confession was not admissible against the defendant under any recognized hearsay exception, and thus the issue became whether the jury was capable of following a limiting instruction, limiting the use of the statement to the declarant. This Court held not. Bruton was careful to note that "the hearsay statement inculcating

petitioner was clearly inadmissible against him under traditional rules of evidence....we intimate no view whatever that such exceptions necessarily raise questions under the Confrontation Clause...." 391 US at 128, fn 3. At the time Bruton was decided the Federal Rules of Evidence were not yet in place, and, despite the strenuous objections of evidence scholars and commentators, see e.g. McCormick, Evidence (2d Edition), p.673-675, the declarations against interest hearsay exception was generally held to apply only to declarations against pecuniary interest. With the acceptance of declarations against penal interest as a hearsay exception, the Confrontation Clause issues regarding substantive admission of a nontestifying codefendant's confession against a defendant have come to the fore.

I. The Development of the Confrontation Clause Test:
"Sufficient Indicia of Reliability So As To Afford the Trier of Fact A Satisfactory Basis For Evaluating The Truth of the Statement"

Wigmore points out that the confrontation clause is related to the rules concerning hearsay, and that the history of the hearsay rule began only in the 1500's. Up to that time, though jury trial had come into being, it was a common practice for the jury to obtain information from informed persons not called into court. Testimony in open court was a rare event. Testimony in open court began to develop during the 1500's and 1600's, reversing the earlier order, with testimony becoming common, and consultation by the jury with informed persons not called into court becoming rare. The question began to arise whether hearsay was competent evidence in the presentation of evidence in court. See 5 Wigmore, Evidence, sec.

1364.

The infamous trial of Sir Walter Raleigh in 1603 for treason is often thought of as the progenitor of the Constitutional Confrontation Clause. Raleigh had no assistance from counsel, and would not have been allowed to call witnesses had he wished to do so. The only defense of the accused was that the case against him had to be completely proved. If it was, there was no need of witnesses from the accused; if it was not, there was likewise no need for witnesses from the accused. Raleigh insisted that the case could not be proven unless he faced his accusers. Reams of deposition testimony by Raleigh's alleged accomplice were admitted, depositions which themselves contained only innuendo and no credible assertions of substance sufficient to support a conviction. Yet Chief Justice Popham refused to produce the alleged

accomplice, Cobham, to testify, stating that "where no circumstances do concur to make a matter probable, then an accuser may be heard in court, and not merely by extrajudicial statement, but so many circumstances agreeing and confirming the accusation in this case, the accuser is not to be produced." 5 Wigmore 1364, p. 16-17; See California v Green, 399 US 149, 26 L Ed 2d 489, 90 S Ct 1930 (1970) (fn 9 and 11, p.507-508)

By the later 1600's and early 1700's, the rule against hearsay had come to be established, with the qualification that it could be used as corroboration, and with several exceptions to application of the rule. Thus, the common law rule of confrontation was a rule requiring confrontation, except where exceptions to the rule of hearsay existed. Wigmore, *supra*. In other words, the right of cross-examination

secured by the common law was not a right devoid of exceptions. McCormick, Evidence, p. 580-581; 5 Wigmore 1397, p.158

The argument that the Confrontation Clause is absolute, and that thus no hearsay can ever be admitted into evidence, has never been accepted. It has also been argued that the Confrontation clause constitutionalized the hearsay rule as it existed at the time of the adoption of the Sixth Amendment. This view is equally untenable. The law of evidence is still subject to thoughtful alteration, and this Court has developed a test for determining whether an alteration in the law of evidence satisfies the Confrontation Clause.

In a somewhat early case on the subject, Pointer v Texas, 380 US 400, 13 L Ed 2d 923, 85 S Ct 1065 (1965), it

was held that the introduction at trial of an unavailable witness's examination testimony was constitutionally impermissible where defendant had no counsel at the examination and no opportunity to cross-examine the witness. Speaking for the Court Justice Black noted:

It cannot seriously be doubted at this late date that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him. 13 L Ed 2d at 926.

This sweeping language must, however, be viewed as dicta, and as dicta impliedly rejected by later cases, for if taken as written it would outlaw the use of all hearsay statements, including those within the recognized exceptions.

That confrontation cannot so readily be equated with cross-examination; indeed that confrontation cannot be viewed as cross-examination with the exception of

those hearsay exceptions recognized at the time of the adoption of the Sixth Amendment, is apparent from California v Green, supra. Involved was a California statute which allowed the prior inconsistent statements of a witness testifying at trial to be admitted as substantive evidence. The Court noted that the generally recognized purpose of the Confrontation Clause is to prevent trial by ex parte affidavit. Justice White, speaking for the majority, went on to discuss the relationship between the Confrontation Clause and hearsay rules:

While it may readily be conceded that the hearsay rules and the confrontation clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete and that the confrontation clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law....merely because evidence is admitted in violation of a long-established hearsay rule does not lead to the automatic conclusion

that confrontation rights have been denied. 26 L Ed 2d at 495.

Justice White further remarked that even had the witness not been present at trial, his prior statement, in the form of examination testimony, could have been admitted as substantive evidence without constitutional difficulty, because at his examination his counsel was not "significantly limited in any way in the scope or nature of his cross-examination of the witness...." 26 L Ed 2d at 501.

In a thoughtful concurrence Justice Harlan observed that the decision of the California Supreme Court was the result of decisions of the United States Supreme Court which "indiscriminately equated 'confrontation' with cross-examination":

If 'confrontation' is to be equated with the right to cross-examine, it would transplant the ganglia of hearsay rules and their exceptions into the body of constitutional protections. The stultifying effect of such a course upon this aspect of the law of evidence in both state and federal systems need

hardly be labored, and it is good that the Court today, as I read its opinion, firmly eschews that course. 26 L Ed 2d at 505.

Justice Harlan went on to call for a "fresh look" at the constitutional conception of confrontation.

In Dutton v Evans, 400 US 74, 27 L Ed 2d 213, 91 S Ct 210 (1970) the Court once again wrestled with the relationship between the Confrontation Clause and cross-examination. A Georgia statute, which allowed admission as substantive evidence statements of a coconspirator during the "concealment phase" of the conspiracy, was attacked on confrontation grounds. Justice Stewart, writing for a four justice plurality, with Justice Harlan concurring, stated that:

The decisions of this court make it clear that the mission of the confrontation clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that 'the trier of fact

(has) a satisfactory basis for evaluating the truth of the prior statement.' (27 L Ed 2d at 227, citing California v Green, emphasis added).

The Court held that:

From the viewpoint of the Confrontation Clause, a witness under oath, subject to cross-examination, and whose demeanor can be observed by the trier of fact, is a reliable informant not only as to what he has seen but what he has heard. 27 L Ed 2d at 226.

Justice Harlan, in his concurring opinion, continued his "fresh look" at confrontation, reaching the conclusion that the position espoused by Wigmore is the correct view:

The Constitution does not prescribe what kinds of testimonial statements (dying declarations or the like) shall be given infra-judicially, - this depends on the law of Evidence for the time being - but only what mode of procedure shall be followed i.e. a cross-examining procedure - in the case of such testimony as is required by the ordinary law of evidence to be given infra-judicially (emphasis added). 5 Wigmore, 1397, p. 131.

Justice Harlan, then, reached the position that questions of hearsay

exceptions and the absence of cross-examination are not Confrontation Clause problems at all, but due process problems. 27 L Ed 2d at 231.

Another case indicating that the mission of the Confrontation Clause is not solely cross-examination is Mancusi v Stubbs, 408 US 204, 33 L Ed 2d 293, 92 S Ct 2308 (1972). The case dealt with the use of prior recorded testimony, and the Court stated:

The focus of the Court's concern has been to insure that there 'are indicia of reliability which have been widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant and to 'afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement.' (citations omitted).

The Court found the cross-examination adequate so as to give the testimony "sufficient indicia of reliability" to afford "the trier of fact a satisfactory basis for evaluating the truth of the prior statement." 33 L Ed 2d at 303.

A somewhat more recent case in the area is Ohio v Roberts, 448 US 56, 65 L Ed 2d 597, 100 S Ct 2531 (1980), another prior recorded testimony case. The Court observed that the Confrontation Clause reflects a "preference" for face-to-face confrontation at trial, and that a primary interest it secures is that of cross-examination. However, this preference may be overcome, principally upon a showing of sufficient indicia of reliability.

In United States v Inadi, 475 US 387, 89 L Ed 2d 390, 106 S Ct 1121 (1986) this Court considered the constitutionality of FRE 801(d)(2)(E), the coconspirator's declarations hearsay exception, in that the Rule does not require unavailability. Holding that "Roberts cannot fairly be read to stand for the radical proposition that no out-of-court-statement can be introduced

by the government without a showing that the declarant is unavailable," 106 S Ct at 1126, the Court upheld the Rule.

The teaching of these cases, then, along with others, is that confrontation cannot be equated with cross-examination, and that hearsay may be admitted substantively if there are "sufficient indicia of reliability so as to provide the trier of fact a satisfactory basis for determining the truth of the statement." It is not the role of the trial court to determine whether the statement is true, or to admit it only if it is subject to no conceivable attack, but to determine whether there is a satisfactory basis for the trier of fact to come to a conclusion as to its veracity.

II. The Sufficient Indicia of Reliability Test and Declarations Against Penal Interest: What Is Relevant To The Inquiry?

A) Firmly Rooted Exceptions

One approach to the reliability inquiry was marked out in Bourjaily v United States, 483 US 171, 97 L Ed 2d 144, 107 S Ct 2775 (1987). The defendant was charged with conspiracy to distribute cocaine. At trial the government introduced taped conversations between an intermediary and a government informant, the intermediary, in arranging a sale of drugs, referring to his "friend" (the defendant) who would be the ultimate recipient, and who had certain questions. At the delivery point the intermediary and the defendant were arrested, in possession of funds in the amount of the agreed purchase price for the drugs. The sixth circuit agreed with the trial court that the government had established by a

preponderance of evidence the existence of a conspiracy, and that the statements were in furtherance of it; the court also rejected a Confrontation Clause challenge.

This Court, through Chief Justice Rehnquist, held that FRE 104(a) permits the court, in deciding to admit a statement under FRE 801(d)(2)(E) as a coconspirator's statement in furtherance of a conspiracy, to consider the hearsay statement sought to be admitted itself in making the preliminary factual determination whether it is more likely than not that there was a conspiracy involving the declarant and the party against whom the statement is offered, and that the statement was made "in the course and in furtherance" thereof. Critically, the Court held that the Confrontation Clause does not require a trial court to make a separate inquiry

into the reliability of a statement that satisfies the requirements for admission under a "firmly rooted" hearsay exception, the exception for coconspirator's statements being such a rule.

One question now before the Court is whether the declaration against penal interest hearsay exception is "firmly rooted," so that a satisfaction of the foundational requirements of the rule ("so far contrary to penal interest it would not have been said unless true") is the end of the inquiry, or whether an independent inquiry into reliability must be undertaken, and, if so, what evidence is relevant to the inquiry. As a related matter, also at issue is whether, even if the declaration against penal interest is not firmly rooted, a rigorous application of its foundational requirements is sufficient nonetheless to satisfy the

"sufficient indicia of reliability" test. The course of the law has not run smooth, which, undoubtedly, has brought this case to this Court.

B) The Independent Inquiry Into Reliability: Is Evidence Corroborating the Truth of Portions of the Statement Relevant?

Central to the questions involved here is the decision in Lee v Illinois, 476 US 530, 90 L Ed 2d 514, 106 S Ct 2056 (1986). In Lee the trial judge at a bench trial expressly relied upon portions of the codefendant's confession in finding defendant Lee guilty of murder, squarely presenting the declaration against penal interest/Confrontation Clause issue. The codefendant, Thomas, had implicated both himself and defendant in the crimes, and the only apparent theory of admissibility of his statement against defendant was the declarations against penal interest

exception. Justice Brennan for a five member majority declined to accept the state's characterization of "the hearsay involved in this case as a simple 'declaration against penal interest.' That concept defines too large a class for meaningful Confrontation Clause analysis. We decide this case as involving a confession by an accomplice which incriminates a criminal defendant." 106 S Ct at 2064, fn 5. In other words, Lee involved a declaration against penal interest, but a particular kind or sort of declaration against penal interest; namely one which declares not only that the declarant is guilty of criminal conduct but that another party is also. Under these circumstances, the majority found that the State's "grounds for holding Thomas' statement to be reliable with respect to Lee's culpability" did not meet the Confrontation Clause

standard of demonstrating substantial indicia of reliability.

This Court found reliability lacking primarily due to its conclusion that there was a clear divergence between the confession of the codefendant and that of the defendant as to the participation of the parties in the murders--"The discrepancies between the two go to the very issues at trial: the roles played by the two defendants in the killing of Odessa, and the question of premeditation in the killing of Aunt Beedie." 106 S Ct at 2065. Because, then, of these conflicts, and the well-recognized motivation to shift blame or curry favor, the majority was "not convinced that there exist sufficient 'indicia of reliability,' flowing from either the circumstances surrounding the confession or the 'interlocking' character of the confessions, to overcome the weighty

presumption against the admission of such uncross-examined evidence." 106 S Ct at 2065.

Justice Blackmun, for a four member dissent, observed that in Bruton the inadmissibility of the codefendant's statements as against the defendant was not contested, and that Bruton therefore only applies to "situations in which the out-of-court statements are constitutionally inadmissible against the defendant," and disagreed with the majority's conclusions as to reliability, stating that in the case before the Court "there is little reason to fear that Thomas' statements to the police may have been motivated by a desire to shift blame to petitioner." 106 S Ct at 2068. Justice Blackmun concluded that "in this case the practical unavailability of petitioner's codefendant as a witness for the State, together with the unusually

strong and convincing indications that his statements to the police were reliable, rendered the confession constitutionally admissible against petitioner." 106 S Ct at 2071.

In Lee, neither the majority nor the dissent took issue with the proposition that a declaration against penal interest can be admitted, consistent with the Confrontation Clause, against a codefendant; the disagreement was on the facts. Moreover, both the majority and the dissent looked to evidence outside the circumstances surrounding the actual making of each statement to examine its reliability; namely, the confession of the other defendant.

That evidence other than the circumstances surrounding the making of the statement at issue can be considered in the reliability inquiry was also indicated in Cruz v New York, 481 US

186, 95 L Ed 2d 162, 107 S Ct 1714 (1987). Two brothers were tried for murder, and the confession of each was admitted at the joint trial, under a limiting instruction that the jury was to consider each confession only against the maker. No redaction was undertaken because the confessions "interlocked," and Parker v Randolph, 442 US 62, 60 L Ed 2d 713, 99 S Ct 2132 (1979) had held (by a plurality) that in such a situation the fear that a jury would not follow a limiting instruction was unfounded. Based on Parker, the New York courts affirmed.

A five member majority, through Justice Scalia, disagreed with the Parker plurality, and did away with the interlocking confession doctrine--a nontestifying codefendant's confession that incriminates the defendant but is not directly admissible against him may

not be introduced at their joint trial even if the jury is instructed not to consider the codefendant's confession against the defendant. The majority reasoned that a codefendant's confession which confirms the defendants confession could be enormously damaging where a defendant is seeking to disavow his statement--in this situation a jury might well disregard a cautionary instruction. However, the Court also remarked that the defendant's confession does bear on whether the nontestifying codefendant's confession has sufficient indicia of reliability to be directly admissible against the defendant (without redaction or a limiting instruction, as a declaration against penal interest) despite the lack of opportunity for cross-examination. Again, then, this Court suggested that evidence corroborating the reliability of the

statement may be considered in the reliability inquiry, and not only the circumstances surrounding the making of the statement. Then came Idaho v Wright.

In Idaho v Wright, 111 L Ed 2d 638 (1990) the defendant, a woman, was charged with lewd conduct with a minor for having jointly committed the crimes against her two daughters (one 5 1/2, the other 2 1/2) by holding them down to permit her codefendant to have sexual intercourse with each. The examining pediatrician, who examined the younger girl, asked her whether sexual abuse occurred between her and the two codefendants, and was allowed to testify to her answers. She did not testify at trial, as she was found not competent. The trial court admitted the statements under IRE 803(24), the Idaho analogue to the federal "catch-all" hearsay exception, which requires a showing of

circumstantial guarantees of trustworthiness, as well as materiality, and a sort of necessity.

The Idaho Supreme Court majority found that the interview with conducted by the doctor lacked sufficient "procedural safeguards" so as to provide sufficient indicia of trustworthiness under the Confrontation Clause, relying principally on the fact that the session was not recorded on videotape, and that leading questions were used (the child, it should be remembered, was 2 1/2 years old at the time). The majority also quoted extensively from developmental psychology texts and articles.

This Court affirmed, applying the Court's previously established framework for review of hearsay exceptions as they relate to the Confrontation Clause--whether there were sufficient indicia of reliability so as to render

the statements in question trustworthy, where a "firmly rooted" hearsay exception is not involved--the majority found an absence of sufficient indicia of reliability. The majority also found that such indicia must be found from the totality of the circumstances, specifically rejecting the elaborate and specific requirements mandated by the Idaho Supreme Court, and noted above. Viewing the totality of the circumstances, rather than any particular set of factors, the majority found that the relevant circumstances are those surrounding the making of the statement, and not other evidence corroborating the statement; by way of example, the court cited spontaneity and consistent repetition, the mental state of the child, the use of terminology unexpected of a child of similar age, the lack of a motive to fabricate. Largely because of

the suggestive manner of the questioning, the majority concluded that the child's statements were not admissible. Wright, then, is in tension with Lee and Cruz on the manner in which reliability is to be examined, a tension which can be resolved in this case.

III. Declarations Against Penal Interest, the Reliability Inquiry, and the Lower Courts

A number of cases from the federal circuits and from state courts have addressed the declaration against penal interest question. In United States v Lilley, 581 F2d 182 (CA 8, 1978), cited by Petitioner in the petition, the Government offered into evidence the statement of defendant's husband, and argued that it satisfied FRE 804(B)(3) as an inculpatory declaration against penal interest (an "inculpatory declaration against interest" is the shorthand that

the federal courts have developed for a declaration against penal interest which inculpatates someone in addition to the declarant). The Eighth Circuit disagreed. The court held first that in fact the statement was not so far contrary to the declarant's penal interest that it would not have been said unless true--Mr. Lilley "attempted to foist the blame" on his wife, "exculpating himself, or at least minimizing his criminal liability." 581 F2d at 187. Thus, the foundation of the rule itself was not met. The remaining discussion regarding inculpatory statements against interest is dicta. Moreover, it is dicta not followed by the Eighth Circuit itself, as demonstrated by United States v Riley, 657 F2d 1377 (CA 8, 1981).

In Riley the defendant was convicted of transporting a minor in interstate

commerce for the purposes of prostitution. The only issue was the intent of the defendant when he transported the minor. The statement of a witness incriminating herself and the defendant was admitted into evidence. The court observed by way of introduction that "The admissibility of collateral inculpatory declarations against penal interest under FRE 804(b)(3) presents a controversial and complex evidentiary problem." 657 F2d at 1380-1381. The court found that the case law in the circuit had "tested inculpatory declarations under FRE 804(b)(3) and thus implicitly assumed their admissibility" (citing cases), 657 F2d at 1382, but found a lack of any "comprehensive analysis" in the cases, largely because in these cases the declaration at issue "was found to have been inadmissible under the rule itself, for example,

because the declaration was not in fact against the penal interest of the declarant at the time it was made," citing Lilley as an example. 657 F2d at 1382. The court went on to accept the admissibility of inculpatory declarations against interest, under the requirements that 1) the declarant is unavailable, as required by the rule, 2) the statement must be so far contrary to penal interest that a reasonable person would not have said it unless true, and 3) corroborating circumstances clearly indicate the trustworthiness of the statement, the final requirement viewed as necessary under the Confrontation Clause. See 657 F2d at 1383, and fn 7. Proceeding to the analysis, the court found that the statement of the declarant was not against her interest under the circumstances, failing the second prong of the test, one contained in the rule of evidence itself.

The Third Circuit cases of United States v Palumbo, 639 F2d 123 (CA 3, 1981) and United States v Bailey, 581 F2d 341 (CA 3, 1978) are also relevant, Palumbo being cited in Petitioner's petition for certiorari. Bailey simply found that the statement was not sufficiently against interest, because made after the declarant "had been offered a bargain involving dismissal of one count of the indictment against him." As the court noted, even the Government "has not pressed its argument on this point here...." 581 F2d at 345. Bailey scarcely rejects, either implicitly or explicitly, the doctrine of inculpatory declarations against interest.

Palumbo holds that inculpatory declarations may be admitted. The court found that the inculpatory statement was not so far against interest that it would

not have been said unless true, but may have been said to "curry favor with the authorities" (though the court noted that the question was not free from doubt). The majority also specifically agreed with the concurring opinion with regard to its explication of the "subtleties of the rule and its application to this case." 639 F2d at 128, fn 5. In that concurrence Judge Adams discussed in detail the history of FRE 804(b)(3), to be discussed subsequently in this argument, as well as the case law, and concluded that the rule allows admission of inculpatory declarations against interest "provided, of course, that admission would not abridge the defendant's rights under the Confrontation Clause of the Sixth Amendment." Judge Adams required, then, the same reliability inquiry as required by the Eighth Circuit.

In the Fifth Circuit, the case of United States v Sarmiento-Perez, 633 F2d 1092 (CA 5, 1981) speaks to the question. The court there clearly held that, where the Constitution is satisfied, inculpatory declarations against interest are admissible under the rule of evidence: "...inculpatory statements against interest are admissible under Rule 804(b)(3) and the confrontation clause of the sixth amendment only if they meet a three-part test....", the court citing the same test followed by the Eighth Circuit, detailed earlier (unavailability, so far contrary to interest that would not have been said unless true, circumstances clearly indicating trustworthiness). In short, the court held that both the rule of evidence and the constitution must be satisfied for the statement to be admissible.

A very important Fifth Circuit case, involving inculpatory declarations against interest given by one in custody, is United States v Vernor, 902 F2d 1182 (CA 5, 1990). There the court began by noting that "after joining his father in a clumsy and botched robbery, leaving a trail of signals worthy of a hired trail blazer, the time came for Gary Keith Vernor to answer to a jury...." Three custodial confessions made by the senior Vernor were admitted into evidence against the defendant (the senior Vernor was convicted at a prior trial, and refused to testify at his son's trial). These statements were admitted under FRE 804(b)(3), and the Fifth Circuit affirmed. In examining them for reliability, the court observed that the foundational requirements of the rule itself go to reliability, as they require a showing that the statement "so

far tended to subject (the declarant) to criminal liability...that a reasonable man in his position would not have made the statement unless he believed it to be true." This threshold was clearly met in the case before it, held the court. As to those portions of the statement incriminating the son, the court found them also reliable, as the father "unambiguously took full responsibility for his own part in the bank robbery. He made no attempt to minimize his own role or to shift the blame from himself to Gary. There is nothing in the record to support an inference that Fred made the statements implicating Gary in an attempt to avenge himself.....There is nothing in the record that indicates that Fred was motivated by a desire to curry favor with his interrogators. There is no evidence that the police...made any promises to Fred or they gave him any reason to

believe that it would help him if he inculcated his son...his statements were made voluntarily...." 902 F 2d at 1188.

Other circuits have also accepted the admissibility of declarations against penal interest, subject to inquiry under the Confrontation Clause. See e.g. United States v Layton, 855 F2d 1388 (CA 9, 1988) (the court found that a statement of a nontestifying individual was both a declaration against penal interest, and satisfied the Confrontation Clause; the statement was against penal interest, not done to curry favor, and not designed to shift blame); United States v Garcia, 897 F2d 1413 (CA 7, 1990) (finding the evidentiary inquiry and the constitutional inquiry to be one and the same); United States v Katsougrakis, 715 F2d 769 (CA 2, 1983); United States v Seeley, 892 F2d 1 (CA 1, 1989) ("the

exception for declarations against penal interest would seem to be 'firmly rooted'). Plainly, the law in the federal system allows the admission of inculpatory declarations against interest, where consistent with the Constitution. Of particular additional interest is the Seventh Circuit case of United States v York, 933 F2d 1343 (CA 7, 1991).

In York the court considered the declaration against interest of a codefendant. The court upheld admission of the statement against both Confrontation Clause challenges and a claim that the portions of the statement inculcating the defendant were not within the hearsay exception. As to the claim that the inculpatory portion of the statement is simply not within the hearsay exception, the court flatly rejected it, and for sound reasons. The court observed that "Admitting

inculpatory statements against interest recognizes...the broader purpose behind this and other hearsay exceptions as well--to permit the use of evidence that is trustworthy (for whatever particular reason) and to exclude that which is unreliable." Moreover, the court pointed out that

There is little question that the drafters of the Rules of Evidence and Congress intended Rule 804(b)(3) to permit admission of inculpatory statements where consistent with the confrontation clause....The advisory committee's notes reflect the view that a statement admitted under the rule 'may include statements implicating (another), and under the general theory of declarations against interest they would be admissible as related statements.'Moreover, Congress deleted a provision from the rule that would have prohibited the use of inculpatory statements against interest, 'to avoid codifying or attempting to codify, constitutional evidentiary principles....' S. Rep. No. 93-1277,The Report discussing this deletion went on

to observe that '(c)odification of a constitutional principle is unnecessary and, where the principle is under development, often unwise.' 933 F 2d at 1361 (emphasis supplied)

The court concluded that "To be admissible under rule 804(b)(3), then, the inculpatory portion of a statement against interest must be sufficiently reliable to satisfy the confrontation clause. There seems little reason to treat the requirement of reliability differently in each context. Such an approach would be needlessly complex, requiring two bodies of case law where one will do." 933 F 2d at 1361 (emphasis added).

Two state recent state cases are also important to the point. The New Hampshire Supreme Court had occasion to consider the admissibility of inculpatory declarations against interest in State v Kiewert, 605 A2d 1031 (N.H. 1992). The wife of one perpetrator of the crime

was allowed to testify to a telephone call she had received from her husband that he and the defendant had just committed an assault and robbery, that he was on the run, and he would not be coming home any more. Shortly thereafter the police pulled over the truck stolen in the robbery, and the witness's husband, the declarant, committed suicide as the police approached. The New Hampshire Supreme Court noted "at the outset that New Hampshire Rule of Evidence 804 'adopts the Federal Rule 804.' NHREV 804 (reporter's notes). We will, therefore, look to federal cases interpreting Federal Rule of Evidence 804 to assist us in construing the New Hampshire rule." 605 A2d at 1034. The court rejected the defendant's claim that "the part of the declarant's statement which incriminated the defendant is not against the declarant's penal interest

and, therefore, is inadmissible hearsay." 605 A2d at 1035. Discussing many of the federal cases previously cited by appellant here, particularly the York decision, the court held that inculpatory declarations against interest are admissible so long as the foundation of the rule itself is met, and the Confrontation Clause is met as well; that is, that there are sufficient indicia of reliability to afford the trier of fact a satisfactory basis for evaluating the truth of the statement (see *infra*).

Finally, amicus would mention People v Poole, 444 Mich 151 (1993). There the Michigan Supreme Court held that an inculpatory declaration against may be admitted if the Confrontation Clause is satisfied, and discussed factors it believed appropriate to the reliability inquiry: weighing in favor of admission are declarations which are 1)voluntarily

given, 2)made contemporaneously with the events, 3)noncustodial; that is, made to family, friends, colleagues, or confederates, 4)uttered spontaneously at the initiation of the declarant. Weighing against admission would be a statement 1)made to law enforcement officers at their prompting, 2)a statement minimizing the role of the declarant or shifting blame, 3)a statement made to avenge the declarant or to curry favor, and 4)a statement where the declarant had a motive to lie or distort the truth. The court can also consider any other circumstances going to reliability, and the presence or absence of a particular factor is not decisive, the totality of the circumstances being looked to on the reliability inquiry. That the statement was custodial is not a factor which weighs in favor of admission, then, but it is not outcome determinative on the question.

IV. Synthesis

A) The Firmly Rooted Exception Approach

As stated previously, this Court has said that "no independent inquiry into reliability is required when the evidence 'falls within a firmly rooted hearsay exception.'..." Is the declaration against penal interest a firmly rooted exception, so that satisfaction of its foundation (that the statement is so far against penal interest that it would not have been said unless true) also may be said to satisfy Confrontation Clause reliability concerns? In United States v Layton, supra, the court noted that "The Supreme Court has not decided whether the declaration against penal interest is such an exception. Four justices, however, have issued an opinion so finding This court has expressly reserved the question without deciding

it....we do not decide whether declarations falling within the scope of Rule 804(b)(3) are presumptively reliable." 855 F 22d at 1405, fn 5.

It might seem peculiar to argue that the declaration against penal interest exception is "firmly rooted" when it was not a recognized exception at the time Bruton v United States was decided, and did not gain full force until the promulgation of the Federal Rules of Evidence. But a careful analysis reveals that the reason the declaration against penal interest exception, as contrasted to the declaration against pecuniary interest exception, did not have wide acceptance until relatively recently, is that for a period of time in the history of the law of evidence the law went backwards, as it were, and has now been restored on its correct path.

Wigmore has fully explained that the period of history when only declarations against pecuniary interest and not declarations against penal interest were accepted as hearsay exceptions was aberrant. As he observes, by 1800 it was fully accepted that "all declarations of facts against interest" were to be received (emphasis in original). 5 Wigmore, sec. 1476, p.350. This included declarations against penal interest. See e.g. Hutlet's Trial, 5 How St. Tr 1185, 1192 (1660); Standen v Standen, Peake 32 (1791); Powell v Harper, 5 Carr and P 590 (1833); 1 Hale, Pleas of the Crown 306 (1680), all discussed in Wigmore, sec. 1476, fn. 8. However, in The Sussex Peerage Case, 8 Eng Rep 1034 (1844) the House of Lords, in a case "not strongly argued", 5 Wigmore, sec. 1476, p.351, "ignored precedents" (McCormick,

Evidence, sec. 278, p.322 (3rd Edition)) and held that the declarations against interest hearsay exception was limited to facts against pecuniary or proprietary interest, but excluded facts against penal interest. Wigmore called this a "backward step," placing an "arbitrary limitation" on the rule, which, unfortunately, was accepted, "although it was plainly a novelty at the time of its inception" (emphasis supplied), 5 Wigmore, p. 351. Its condemnation by scholars was universal, until finally the step backward was retraced. See e.g. Wigmore, McCormick, Donnelly v United States, 228 US 243, 277, 57 L Ed 820 (1913), Holmes dissenting; Lee v Illinois, infra, 90 L Ed 2d at 533, fn. 4, Justice Blackmun dissenting.

At least one circuit has recently accepted the view that the declaration against penal interest is firmly rooted,

the Seventh Circuit, in the York case.
The court stated:

Our holding in Garcia (897 F2d 1413 (CA 7, 1990)) was tantamount to saying that the exception is well-rooted within the meaning of Roberts and Bourjaily, and we affirm that view today....So long as the incriminating and inculpatory portions of a statement are closely related..., if the circumstances surrounding the portion of a declarant's statement inculcating another are such that the court determines that the inculpatory portion of the statement is just as trustworthy as the portion of the statement directly incriminating the declarant, there is no need to excise or sever the inculpatory portion of the statement (emphasis supplied, 933 F2d at 1363-1364).

See also the First Circuit case of United States v Seeley, supra ("the exception for declarations against penal interest would seem to be 'firmly rooted'").

Amicus submits that the declaration against penal interest is a firmly rooted hearsay exception, so that if its foundational requirement is truly met,

the statement, including that part which inculcates another, is admissible. As noted, the advisory committee notes to the Federal Rule state that a declaration against interest "may include statements implicating (another), and under the general theory of declarations against interest they would be admissible as related statements." Dean Wigmore was of this same view:

since the principle is that the statement is made under circumstances fairly indicating the declarant's sincerity and accuracy...it is obvious that the situation indicates the correctness of whatever he may say while under that influence. In other words, the statement may be accepted, not merely as to the specific fact against interest, but also as to every fact contained in the same statement. 5 Wigmore, Evidence (Chadbourn rev, s.1465, p.339 (emphasis in original)).

B) Consideration of Corroborative Evidence

Amicus submits that Wigmore is correct in his approach that the entire

statement should be admitted because made while the declarant was in a trustworthy state of mind. With a dying declaration or excited utterance, the state of mind of the declarant is revealed by the circumstances surrounding the making of the statement, which reveal a trustworthy state of mind: one would not lie regarding the circumstances of his injuries while in fear of dying, and one would not lie while speaking under the excitement caused by a startling event. The declaration against penal interest is viewed as trustworthy, however, not only because of the circumstances under which it was given, but because of its content; a person would not likely lie regarding their participation in a crime. This means that the trustworthy state of mind is revealed principally by the content of the statement, rather solely than by the circumstances of its making. And, of course, the circumstances are relevant

--for example, if coerced, the statement is not reliable despite its content. But the incriminating nature of the statement reveals that the declarant is of a state of mind to speak truthfully regarding the event, and whatever is said about the entire criminal episode, including that incriminating others, is part of what happened, and should be admissible under the rule. This does not mean that any statement against penal interest is automatically admissible, for either the circumstances or the content may show that the declarant was not in a trustworthy state of mind, but of a mind to shift blame, or curry favor. Exploration of these circumstances is a part of the admissibility inquiry, but if this reliability inquiry is satisfied, demonstrating the trustworthy state of mind of the declarant, then all facts in his or her statement which relate to the criminal event should be admissible under

the rule.

The York court observed that the inquiry as to whether the declaration against penal interest was "so far contrary to penal interest it would not have been said unless true" is the same inquiry that would be undertaken under the Confrontation Clause in any event, so that the development of two bodies of case law "when one will do" is not necessary. The degree to which the declarant exposes him or herself to culpability, any shifting of blame, motive to shift blame or curry favor, any involuntariness, any threats or promises, whether the statement is custodial or not, all go into the inquiry as to whether the rule has been satisfied, and, whether the rule be deemed firmly rooted or not, if reliability is determined under the rule, then a showing has been made of "sufficient indicia or reliability to afford the trier of fact a

satisfactory basis to evaluate the truth of the statement."

The remaining point is whether, in determining whether the declaration is "so far contrary to penal interest it would not be said unless true," which includes an examination of factors such as custody, desire or motive to curry favor, desire or motive to blame-shift, actual blame-shifting, and so on, consideration of evidence which supports the truth of facts contained within the statement by corroborating them can be considered, or whether only the "circumstances surrounding the making of the statement," as stated in Idaho v Wright, may be considered.

Amicus submits that, at least with the declaration against penal interest, facts which corroborate the reliability of the statement, as well as the circumstances surrounding the making of

the statement, should be considered in the reliability inquiry. In order to determine whether the statement is so far contrary to penal interest it would not have been said unless true this inquiry may be necessary. One can admit liability as an accomplice, while naming another as the principal. Though the legal culpability of the two may be the same, it could still be argued that the declarant was attempting to shift or spread blame; however, it could also be that the declarant was simply accurately describing the criminal episode. If there is other evidence supporting the version of events given by the declarant, then that evidence is highly probative on the question of whether the statement given is "so far contrary to penal interest it would not have been said unless true," or was said to shift blame or share blame. The evidence does go to

reliability, and since the question is whether the trier of fact will have a satisfactory basis to evaluate the statement, other corroborative evidence could certainly be considered by the jury in determining the weight and credibility of the evidence, and thus should be considered by the trial court in determining whether a satisfactory basis for evaluating the truth of the statement exists.

In this regard amicus would point out that it must be born in mind that the question is whether there is "sufficient indicia of reliability" so as to afford "the trier of fact a satisfactory basis for evaluating the truth of the prior statement," a test which is met here. The question is not whether there is no other possibility than that, to the satisfaction of the trial judge (and the appellate courts) the statement is true.

It is the duty of the court to determine whether there is a satisfactory basis for the factfinder to base a decision as to whether the statement is true or false, that ultimate decision resting with the factfinder and not the court.

Amicus submits, then, that the declaration against penal interest is a firmly rooted exception, so that satisfaction of the foundational requirements for the rule satisfies the Confrontation Clause test; moreover, even if the declaration against penal interest is not viewed as firmly rooted, the foundational requirements of the rule encompass the reliability inquiry that should be undertaken in any event, and in undertaking that inquiry consideration of evidence which corroborates the truth of the statement, and thereby its reliability, should be permitted, given that the "trustworthy state of mind" of the declarant is revealed, with a

declaration against penal interest, by the content of the statement as well as the circumstances under which it was given.

Conclusion

Amicus would request, then, that this Court hold that satisfaction of the foundational requirements for the declaration against interest exception is sufficient to satisfy the Confrontation Clause test that there be sufficient indicia of reliability to afford the trier of fact a satisfactory basis to evaluate the truth of the statement (with the fact that the statement is either custodial or noncustodial being but one factor in the inquiry), either because the declaration against interest is a firmly rooted hearsay exception, or because the satisfaction of the foundational requirements are identical with the Confrontation Clause inquiry in any event. In determining whether

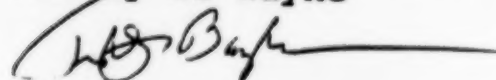
sufficient indicia of reliability exist to afford the trier of fact a satisfactory basis for evaluation of the truth of the statement, amicus submits that the Court should hold that consideration of evidence which corroborates the reliability of the statement, in addition to the circumstances surrounding the making of the statement, is relevant to the inquiry.

CONCLUSION

Wherefore, amicus respectfully requests that the judgment of the Eleventh Circuit Court of Appeals be affirmed.

Respectfully submitted,

JOHN D. O'HAIR
Prosecuting Attorney
County of Wayne


TIMOTHY A. BAUGHMAN
Chief of Research,
Training and Appeals